24-53 No. 727

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United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

against

PRIVATE BRANDS, INC., and
FRANCIS F. CAREY,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPENDIX TO APPELLANTS' BRIEF

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United States Court of Appeals

For the Second Circuit

THE UNITED STATES

vs.

PRIVATE BRANDS INC. and FRANCIS P. CAREY.

Docket Entries

Date	Proceedings
1954	
Dec. 2	—Indictment filed.
Dec. 8	—Notice of appearance for Defendants filed.
Dec. 8	—Before Inch, Chief Justice. Defendants arraigned and a plea of not guilty entered for each Defendant. Francis P. Carey appearing as President of the Defendant Private Brands Inc. Defendant Carey paroled in custody of counsel, case adjourned to January 24, 1955.
Dec. 15	—Notice of motion and affidavit filed for an order permitting Defendant to inspect the Grand Jury minutes. Returnable December 20, 1954.
Dec. 20	—Before Inch, Chief Justice. Hearing on above motion adjourned to December 27, 1954.
Dec. 27	—Before Inch, Chief Justice. Hearing on above motion. Motion argued and denied.

Docket Entries

Date	Proceedings
1955	
Jan. 7	—By Inch, Chief Justice. Order filed denying motion for an order permitting Defendants to inspect Grand Jury minutes (notice of entry mailed to Defendants' attorney and to U. S. Attorney, E. D. N. Y.).
Jan. 24	—Before Galston, J. Case called and adjourned to January 27, 1955.
Jan. 27	—Before Galston, J. Case called and adjourned to January 31, 1955.
Jan. 31	—Before Galston, J. Defendant Carey present. Trial ordered and adjourned to February 1, 1955.
Feb. 1	—Before Galston, J. Defendant Carey present. Trial resumed and adjourned to February 2, 1955.
Feb. 2	—Before Galston, J. Defendant Carey present. Trial resumed. Mr. Driscoll moves for a judgment of acquittal as to each Defendant. Motion denied. Trial adjourned to February 3, 1955.
Feb. 3	—Before Galston, J. Defendant Carey present. Trial resumed. Trial adjourned to February 4, 1955.
Feb. 4	—Before Galston, J. Defendant Carey present. Trial resumed. Trial adjourned to February 7, 1955.
Feb. 7	—Before Galston, J. Defendant Carey present. Trial resumed and concluded. Jury returned and render a verdict of guilty as charged as to each of the 21 counts in the Indictment as to each Defendant, Private Brands, Inc. and Francis

Docket Entries

Date	Proceedings
1955	
	P. Carey. Jury discharged. Defendant Carey paroled in custody of his attorney, Jeremiah Driscoll and Defendant ordered to return February 21, 1955 for sentence.
Feb. 11—	Affidavit and notice of motion filed for an order extending time within which to make a motion for a new trial pursuant to Rule 33. Returnable February 15, 1955.
Feb. 14—	Stipulation of substitution of attorney for Defendant Corporation filed.
Feb. 15—	Copy of letter sent to Defendants' attorney by U. S. Attorney objecting to above motion read and filed.
Feb. 15—	Before Galston, J. Motion to extend time to make motion for new trial etc., adjourned to February 21, 1955.
Feb. 21—	Before Galston, J. Motion to extend time to make motion for new trial. Decision reserved. Mr. Palmer was ordered to submit March 7, 1955. U. S. Attorney to submit by March 9, 1955. All papers by March 9, 1955. Affidavit of Francis P. Carey filed.
Feb. 21—	Before Galston, J. Case called. Mr. Driscoll, attorney for Defendant Carey moves to withdraw as attorney for Defendant Carey and have Mr. Archibald Palmer substituted in his place. Motion granted. Sentence adjourned to March 7, 1955.
Feb. 21—	Stipulation of substitution for Defendant Carey filed.
Mar. 1—	Stenographer's transcript of record (January 31, 1955-February 7, 1955) filed.

Docket Entries

Date	Proceedings
1955	
Mar. 7	—Before Galston, J. Defendants present. Sentence adjourned to March 9, 1955.
Mar. 7	—Affidavit of Richard C. Packard filed.
Mar. 9	—Before Galston, J. Defendant and counsel present. Defendant Private Brands Inc. through its President Francis P. Carey, sentenced to pay a fine of $100.00 on each of counts 1 to 21 inclusive, totaling $2100.00. Imposition of prison sentence suspended as to Defendant Carey and Defendant Carey placed on probation for 1 year and to pay a fine of $100.00 on each of counts 1 to 21 inclusive and to stand committed until fines are paid or discharged by law. Court grants stay for payment of fines until Monday, March 14, 1955. Defendants' motion for new trial formerly made—denied.
Mar. 9	—By Galston, J. Judgment filed (Private Brands Inc.).
Mar. 9	—By Galston, J. Judgment and order of probation filed. Cer't copies delivered to Probation Department (Carey).
Mar. 10	—Stenographer's minutes of March 7, 1955 filed.
Mar. 14	—Notice of appeal for the Defendants filed.
Mar. 14	—Copy of the notice of appeal together with A. C. Form 54 (Statement of Clerk's Docket Entries) mailed to Clerk, U. S. Court of Appeals, New York City.

Docket Entries

Date	Proceedings
1955	
Mar. 14	Notices of the taking of appeal by the Defendants mailed to U. S. Marshal, Eastern District of New York, and to Warden, Detective Headquarters, New York City.
Mar. 14	Notice on preparation of Record on Appeal mailed to Defendants' attorney, Archibald Palmer, 320 Broadway, New York.
Mar. 15	By Bruchhausen, J. Order filed that as security for the payment of the fines imposed herein sum of $4200.00 is to be paid to Clerk in two certified checks and he is directed to accept same and to deposit same in Registry of this Court, etc. ($4200.00 deposited in Registry, March 16, 1955).

Indictment

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

No. Cr. 43769

(Title 18, United States Code, Section 1001)

UNITED STATES OF AMERICA,

against

PRIVATE BRANDS, INC. and FRANCIS P. CAREY,

Defendants.

THE GRAND JURY CHARGES:

COUNT ONE

1. That at all times hereinafter mentioned, Private Brands, Inc., was a New Jersey corporation, having its office and principal place of business at No. One Pleasant Avenue, Clifton, New Jersey, and the defendant, Francis P. Carey, was its president.

2. That at all times hereinafte mentioned Armed Services Medical Procurement Agency (hereinafter called the "Agency" was an agency of the United States, having its office and principal place of operation at No. 84 Sands Street, Brooklyn, New York, and had the function of purchasing medical supplies, drugs and pharmaceutical compounds on behalf of the Armed Services and the Veterans Administration.

3. That on or about December 26, 1951, the Agency and Private Brands, Inc., by Francis P. Carey, its president, entered into a contract, identified under the Agency's office identification number 36603 (hereinafter called "contract number 36603"), whereby Private Brands, Inc., as the contractor, agreed for a monetary consideration of Nine Thousand Two Hundred Three Dollars and Fifty-two Cents ($9,203.52), to furnish and deliver to such destinations as should subsequently be designated by the government Twenty-five Thousand Eight Hundred Twenty-four (25,824) bottles of chloroform, such chloroform to be in accordance with the following prescribed standard: Chloroform, 1 lb.: USP; Do Not Use For Anesthesia.

4. That on or about April 19, 1952, within the Eastern District of New York, in a matter within the jurisdiction of an agency of the United States, viz., the Agency, the defendants, Private Brands, Inc., the contractor, and Francis P. Carey, its president, did knowingly and wilfully use a false document, to wit, a bill of defendant; Private Brands, Inc., dated April 15, 1952, in that they submitted and caused to be submitted the said bill to the Agency for payment, said defendants knowing the said document to contain a false and fraudulent entry, to wit, that there was being shipped under the said contract number 36603, to Atlanta Gen. Depot, U. S. Army, Atlanta, Ga., Two Thousand Eight Hundred Eighty (2,880) bottles of "Chloroform, 1 lb. USP; Do not use for Anesthesia", and to contain a false and fraudulent statement in the name of the defendant, Private Brands, Inc., subscribed by the defendant, Francis P. Carey, its president, to wit:

> "I certify that the above bill is correct and just and that payment therefor has not been received.
>
> PRIVATE BRANDS, INC.
> (sgd.) F. P. CAREY
> F. P. CAREY—President."

3. That said entry and said statement were false and fraudulent, as the defendants then and there well knew, in that the said Two Thousand Eight Hundred Eighty (2,880) bottles of chloroform identified in said bill, dated April 15, 1952, did not constitute chloroform of USP quality, but constituted chloroform of a quality other than USP quality chloroform. (Title 18, United States Code, Section 1001.)

COUNT TWO

1. Repeats and realleges paragraphs 1, 2, and 3 of Count One.

2. Repeats and realleges all of the allegations of paragraph 4 of Count One, except that the bill was dated April 17, 1952, the depot was Louisville Medical Depot, Louisville, Ky., and the number of bottles was Seven Hundred Twenty (720).

3. Repeats and realleges all of the allegations of paragraph 5 of Count One, except that the number of bottle was Seven Hundred Twenty (720), and the bill was dated April 17, 1952. (Title 18, United States Code, Section 1001.)

COUNT THREE

1. Repeats and realleges paragraphs 1, 2, and 3 of Count One.

2. Repeats and realleges all of the allegations of paragraph 4 of Count One, except that the bill was submitted to the Agency on or about April 23, 1952, the bill was dated April 21, 1952, the depot was St. Louis Medical Depot, 12th

and Spruce Sts., St. Louis, Mo., and the number of bottles was Six Thousand (6,000).

3. Repeats and realleges all of the allegations of paragraph 5 of Count One, except that the number of bottles was Six Thousand (6,000), and the bill was dated April 21, 1952. (Title 18, United States Code, Section 1001.)

COUNT FOUR

1. Repeats and realleges paragraphs 1, 2, and 3 of Count One.

2. Repeats and realleges all of the allegations of paragraph 4 of Count One, except that the bill was submitted to the Agency on or about April 24, 1952, the bill was dated April 22, 1952, the depot was Alameda Medical Depot, Alameda, Calif., and the number of bottles was Three Thousand Six Hundred (3,600).

3. Repeats and realleges all of the allegations of paragraph 5 of Count One, except that the number of bottles was Three Thousand Six Hundred (3,600), and the bill was dated April 22, 1952. (Title 18, United States Code, Section 1001.)

COUNT FIVE

1. Repeats and realleges paragraphs 1, 2, and 3 of Count One.

2. Repeats and realleges all of the allegations of paragraph 4 of Count One, except that the bill was submitted to the Agency on or about April 29, 1952, the bill was dated April 25, 1952, the depot was Schenectady General Depot, U. S. Army, Schenectady, New York, and the number of bottles was Twelve Thousand Eight Hundred Sixty-two (12,862) (3,600 export; 9,262 domestic).

3. Repeats and realleges all of the allegations of paragraph 5 of Count One, except that the number of bottles was Twelve Thousand Eight Hundred Sixty-two (12,862) (3,600 export; 9,262 domestic), and the bill was dated April 25, 1952. (Title 18, United States Code, Section 1001.)

COUNT SIX

1. Repeats and realleges paragraphs 1, 2, and 3 of Count One.

2. That on or about April 19, 1952, within the Eastern District of New York, in a matter within the jurisdiction of an agency of the United States, viz., the Agency, the defendants, Private Brands, Inc., the contractor, and Francis P. Carey, its president, did knowingly and wilfully conceal by a device a material fact, in that they submitted and caused to be submitted to the Agency, for payment, a bill of defendant, Private Brands, Inc., dated April 15, 1952, in which it was stated that there had been shipped under the said contract number 36603, to Atlanta Gen. Depot, U. S. Army, Atlanta, Ga., Two Thousand Eight Hundred Eighty (2,880) bottles of "Chloroform 1 lb. USP; Do not use for Anesthesia", identified by the contractor's Lot number 2081, which lot number had been assigned by the contractor.

3. That the material fact concealed by the defendants was that such chloroform so identified in said bill, dated April 15, 1952, by the contractor's Lot number 2081, in truth and in fact, as the defendants then and there well knew, constituted a portion of a lot of chloroform, contained in Twenty-five Thousand Eight Hundred Twenty-four (25,824) 1 lb. bottles, more or less, identified by the contractor's Lot number 2049, which lot, on the basis of samples which

previously had been selected therefrom and had been analyzed by the Agency laboratory had been rejected by the Agency for failure to conform to some of the specifications for USP quality chloroform.

4. That the device used to conceal the above-mentioned material fact was the submission by the defendants to the Agency on or about April 19, 1952, of said bill, dated April 15, 1952, wherein it was stated that there had been shipped under said contract number 36603, to Atlanta Gen. Depot, U. S. Army, Atlanta, Ga., some Two Thousand Eight Hundred Eighty (2,880) 1 lb. bottles of chloroform, which chloroform was identified in said bill by the contractor's Lot number 2081, when, in truth and in fact, as the defendants then and there well knew, the chloroform referred to in said bill comprised a portion of the lot of chloroform contained in the Twenty-five Thousand Eight Hundred Twenty-four (25,824) 1 lb. bottles, more or less, identified by the contractor's Lot number 2049, which lot had been rejected by the Agency for failure to conform to some of the specifications for USP quality chloroform. (Title 18, United States Code, Section 1001.)

COUNT SEVEN

1. Repeats and realleges paragraphs 1, 2, and 3 of Count One.

2. Repeats and realleges all of the allegations of paragraph 2 of Count Six, except that the bill was dated April 17, 1952, the depot was Louisville Medical Depot, Louisville, Ky., and the number of bottles was Seven Hundred Twenty (720).

3. Repeats and realleges all of the allegations of paragraph 3 of Count Six, except that the bill was dated April 17, 1952.

4. Repeats and realleges all of the allegations of paragraph 4 of Count Six, except that the bill was dated April 17, 1952, the depot was Louisville Medical Depot, Louisville, Ky., and the number of bottles was Seven Hundred Twenty (720). (Title 18, United States Code, Section 1001.)

COUNT EIGHT

1. Repeats and realleges paragraphs 1, 2, and 3 of Count One.

2. Repeats and realleges all of the allegations of paragraph 2 of Count Six, except that the bill was submitted to the Agency on or about April 23, 1952, the bill was dated April 21, 1952, the depot was St. Louis Medical Depot, 12th & Spruce Sts., St. Louis, Mo., and the number of bottles was Six Thousand (6,000).

3. Repeats and realleges all of the allegations of paragraph 3 of Count Six, except that the bill was dated April 21, 1952.

4. Repeats and realleges all of the allegations of paragraph 4 of Count Six, except that the bill was submitted to the Agency on or about April 23, 1952, the bill was dated April 21, 1952, the depot was St. Louis Medical Depot, 12th & Spruce Sts., St. Louis, Mo., and the number of bottles was Six Thousand (6,000). (Title 18, United States Code, Section 1001.)

COUNT NINE

1. Repeats and realleges paragraphs 1, 2, and 3 of Count One.

2. Repeats and realleges all of the allegations of paragraph 2 of Count Six, except that the bill was submitted to the Agency on or about April 24, 1952, the bill was dated April 22, 1952, the depot was Alameda Medical Depot, Alameda, Calif., and the number of bottles was Three Thousand Six Hundred (3,600).

3. Repeats and realleges all of the allegations of paragraph 3 of Count Six, except that the bill was dated April 22, 1952.

4. Repeats and realleges all of the allegations of paragraph 4 of Count Six, except that the bill was submitted to the Agency on or about April 24, 1952, the bill was dated April 22, 1952, the depot was Alameda Medical Depot, Alameda, Calif., and the number of bottles was Three Thousand Six Hundred (3,600). (Title 18, United States Code, Section 1001.)

COUNT TEN

1. Repeats and realleges paragraphs 1, 2, and 3 of Count One.

2. Repeats and realleges all of the allegations of paragraph 2 of Count Six, except that the bill was submitted to the Agency on or about April 29, 1952, the bill was dated April 25, 1952, the depot was Schnectady General Depot, U. S. Army, Schenectady, New York, and the number of bottles was Twelve Thousand Eight Hundred Sixty-two (12,862) (3,600 export; 9,262 domestic).

3. Repeats and realleges all of the allegations of paragraph 3 of Count Six, except that the bill was dated April 25, 1952.

4. Repeats and realleges all of the allegations of paragraph 4 of Count Six, except that the bill was submitted to the Agency on or about April 29, 1952, the bill was dated April 25, 1952, the depot was Schenectady General Depot, U. S. Army, Schenectady, New York, and the number of bottles was Twelve Thousand Eight Hundred Sixty-two (12,862) (3,600 export; 9,262 domestic). (Title 18, United States Code, Section 1001.)

COUNT ELEVEN

1. Repeats and realleges paragraphs 1, 2, and 3 of Count One.

2. That on or about February 25, 1952, the Agency partially exercised an optional increase in quantity clause contained in contract number 36603 (whereby the Agency had the power to issue orders for the delivery of additional quantities of 1 lb. bottles of USP quality chloroform not to exceed 100% of the quantity of such item covered by the contract), by issuing an order, identified as delivery order number 36603-1, to defendant, Private Brands, Inc., the contractor, to furnish and deliver to such destinations as should be later designated an additional Eleven Thousand Six Hundred Sixteen (11,616) bottles of chloroform, such chloroform to be in accordance with the following prescribed standard: Chloroform, 1 lb.; USP; Do Not Use For Anesthesia.

3. That on or about June 6, 1952, within the Eastern District of New York, in a matter within the jurisdiction of an agency of the United States, viz. the Agency, the defendants, Private Brands, Inc., the contractor, and Francis P. Carey, its president, did knowingly and wilfully use a false document, to wit, a bill of defendant, Private Brands,

Inc., dated June 2, 1952, in that they submitted and caused to be submitted the said bill to the Agency for payment, said defendants knowing the said document to contain a false and fraudulent entry, to wit, that there was being shipped under said delivery order number 36603-1 issued under contract number 36603, to Louisville Medical Depot, Louisville, Ky., Six Hundred (600) bottles (240 domestic; 360 export) of "Chloroform, 1 lb. USP; Do not use for Anesthesia", and to contain a false and fraudulent statement in the name of defendant, Private Brands, Inc., subscribed by the defendant, Francis P. Carey, its president, to wit:

> "I certify that the above bill is correct and just and that payment therefor has not been received.
>
> PRIVATE BRANDS, INC.
> (sgd.) F. P. CAREY
> F. P. CAREY—President."

4. That said entry and said statement were false and fraudulent, as the defendants then and there well knew, in that the said Six Hundred (600) bottles of chloroform identified in said bill, dated June 2, 1952, did not constitute chloroform of USP quality, but constituted chloroform of a quality other than USP quality chloroform. (Title 18, United States Code, Section 1001.)

COUNT TWELVE

1. Repeats and realleges paragraphs 1, 2, and 3 of Count One.

2. Repeats and realleges paragraph 2 of Count Eleven.

3. Repeats and realleges all of the allegations of paragraph 3 of Count Eleven, except that the depot was At-

lanta General Depot, U. S. Army, Army Depot, Atlanta, Georgia, and the number of bottles was Two Thousand Nine Hundred Seventy-six (2,976) (576 domestic; 2,400 export).

4. Repeats and realleges all of the allegations of paragraph 4 of Count Eleven, except that the number of bottles was Two Thousand Nine Hundred Seventy-six (2,976) (576 domestic; 2,400 export). (Title 18, United States Code, Section 1001.)

COUNT THIRTEEN

1. Repeats and realleges paragraphs 1, 2, and 3 of Count One.

2. Repeats and realleges paragraph 2 of Count Eleven.

3. Repeats and realleges all of the allegations of paragraph 3 of Count Eleven, except that the depot was St. Louis Medical Depot, 12th & Spruce Sts., St. Louis, Mo., and the number of bottles was Three Thousand Six Hundred Seventy-two (3,672) (672 domestic; 3,000 export).

4. Repeats and realleges all of the allegations of paragraph 4 of Count Eleven, except that the number of bottles was Three Thousand Six Hundred Seventy-two (3,672) (672 domestic; 3,000 export). (Title 18, United States Code, Section 1001.)

COUNT FOURTEEN

1. Repeats and realleges paragraphs 1, 2 and 3 of Count One.

2. Repeats and realleges paragraph 2 of Count Eleven.

3. Repeats and realleges all of the allegations of paragraph 3 of Count Eleven, except that the bill was submitted to the Agency on or about June 10, 1952, the bill was dated June 3, 1952, the depot was the Schenectady General Depot, U. S. Army, Schenectady, New York, and the number of bottles was Three Thousand One Hundred Forty-four (3,144) (864 domestic; 2,280 export).

4. Repeats and realleges all of the allegations of paragraph 4 of Count Eleven, except that the number of bottles was Three Thousand One Hundred Forty-four (3,144) (864 domestic; 2,280 export), and the bill was dated June 3, 1952. (Title 18, United States Code, Section 1001.)

COUNT FIFTEEN

1. Repeats and realleges paragraphs 1, 2, and 3 of Count One.

2. Repeats and realleges paragraph 2 of Count Eleven.

3. Repeats and realleges all of the allegations of paragraph 3 of Count Eleven, except that the bill was submitted to the Agency on or about June 10, 1952, the bill was dated June 4, 1952, the depot was Alameda Medical Depot, Alameda, California, and the number of bottles was One Thousand Four Hundred Forty (1,440).

4. Repeats and realleges all of the allegations of paragraph 4 of Count Eleven, except that the number of bottles was One Thousand Four Hundred Forty (1,440), and the bill was dated June 4, 1952. (Title 18, United States Code, Section 1001.)

Indictment

COUNT SIXTEEN

1. Repeats and realleges paragraphs 1, 2, and 3 of Count One.

2. That on or about March 7, 1952, the Agency further partially exercised an optional increase in quantity clause contained in contract number 36603 (whereby the Agency had the power to issue orders for the delivery of additional quantities of 1 lb. bottles of USP quality chloroform not to exceed 100% of the quantity of such item covered by the contract), by issuing an order, identified as delivery order number 36603-2, to defendant, Private Brands, Inc., the contractor, to furnish and deliver to such destinations as should be later designated an additional Twelve Thousand Forty-eight (12,048) bottles of chloroform, such chloroform to be in accordance with the following prescribed standard: Chloroform, 1 lb.: USP; Do Not Use For Anesthesia.

3. Repeats and realleges all of the allegations of paragraph 3 of Count Eleven, except that the event occurred on June 10, 1952, the delivery order number was 36603-2, the bill was dated June 4, 1952, the depot was U. S. Naval Supply Depot, Mechanicsburg, Pa., and the number of bottles was Two Thousand Three Hundred Twenty-eight (2,328).

4. Repeats and realleges all of the allegations of paragraph 4 of Count Eleven, except that the number of bottles was Two Thousand Three Hundred Twenty-eight (2,328), and the bill was dated June 4, 1952. (Title 18, United States Code, Section 1001.)

Indictment

COUNT SEVENTEEN

1. Repeats and realleges paragraphs 1, 2, and 3 of Count One.

2. Repeats and realleges paragraph 2 of Count Sixteen.

3. Repeats and realleges all of the allegations of paragraph 3 of Count Eleven, except that the bill was submitted to the Agency on or about June 10, 1952, the delivery order number was 36603-2, the bill was dated June 4, 1952, the depot was Atlanta Gen. Depot, U. S. Army, Atlanta (Army Depot), Ga., and the number of bottles was Nine Hundred Eighty-four (984).

4. Repeats and realleges all of the allegations of paragraph 4 of Count Eleven, except that the number of bottles was Nine Hundred Eighty-four (984), and the bill was dated June 4, 1952. (Title 18, United States Code, Section 1001.)

COUNT EIGHTEEN

1. Repeats and realleges paragraphs 1, 2, and 3 of Count One.

2. Repeats and realleges paragraph 2 of Count Sixteen.

3. Repeats and realleges all of the allegations of paragraph 3 of Count Eleven, except that the bill was submitted to the Agency on or about June 10, 1952, the delivery order number was 36603-2, the bill was dated June 4, 1952, the depot was Schenectady General Depot, U. S. Army, South Schenectady, New York, and the number of bottles was Nine Hundred Eighty-four (984).

4. Repeats and realleges all of the allegations of paragraph 4 of Count Eleven, except that the number of bottles

was Nine Hundred Eighty-four (984) and the bill was dated June 4, 1952. (Title 18, United States Code, Section 1001.)

COUNT NINETEEN

1. Repeats and realleges paragraphs 1, 2, and 3 of Count One.

2. Repeats and realleges paragraph 2 of Count Sixteen.

3. Repeats and realleges all of the allegations of paragraph 3 of Count Eleven, except that the bill was submitted to the Agency on or about June 10, 1952, the delivery order number was 36603-2, the bill was dated June 5, 1952, the depot was Louisville Medical Depot, Louisville, Ky., and the number of bottles was Four Thousand Four Hundred Eighty-eight (4,488).

4. Repeats and realleges all of the allegations of paragraph 4 of Count Eleven, except that the number of bottles was Four Thousand Four Hundred Eighty-eight (4,488), and the bill was dated June 5, 1952. (Title 18, United States Code, Section 1001.)

COUNT TWENTY

1. Repeats and realleges paragraphs 1, 2, and 3 of Count One.

2. Repeats and realleges paragraph 2 of Count Sixteen.

3. Repeats and realleges all of the allegations of paragraph 3 of Count Eleven, except that the bill was submitted to the Agency on or about June 10, 1952, the delivery order number was 36603-2, the bill was dated June 5, 1952, the

depot was St. Louis Medical Depot, 12th & Spruce Streets, St. Louis, Missouri, and the number of bottles was One Thousand Nine Hundred Ninety-two (1,992).

4. Repeats and realleges all of the allegations of paragraph 4 of Count Eleven, except that the number of bottles was One Thousand Nine Hundred Ninety-two (1,992), and the bill was dated June 5, 1952. (Title 18, United States Code, Section 1001.)

COUNT TWENTY-ONE

1. Repeats and realleges paragraphs 1, 2, and 3 of Count One.

2. Repeats and realleges paragraph 2 of Count Sixteen.

3. Repeats and realleges all of the allegations of paragraph 3 of Count Eleven, except that the bill was submitted to the Agency on or about June 10, 1952, the delivery order number was 36603-2, the bill was dated June 5, 1952, the depot was Alameda Medical Depot, 2155 Webster Street, Alameda, California, and the number of bottles was One Thousand Four Hundred Eighty-eight (1,488).

4. Repeats and realleges all of the allegations of paragraph 4 of Count Eleven, except that the number of bottles was One Thousand Four Hundred Eighty-eight (1,488), and the bill was dated June 5, 1952. (Title 18, United States Code, Section 1001.)

A True Bill:

.....

Foreman.

.....

United States Attorney.

Notice of Motion

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

against

PRIVATE BRANDS, INC and FRANCIS P. CAREY,

Defendants.

Sir:

PLEASE TAKE NOTICE that upon the annexed affidavit of Archibald Palmer, duly sworn to the 11th day of February, 1955, a motion will be made before the Honorable Clarence G. Galston, United States District Judge, at his Courtroom in the United States Courthouse, Washington and Johnson Streets, in the Borough of Brooklyn, City of New York, on the 15th day of February, 1955 at ten-thirty o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, for an order extending the time within which to make a motion for a new trial in the above entitled matter, pursuant to Rule 33 of the Federal Rules of Criminal Procedure, up to and including the 4th day of March, 1955, and for such other and further relief as may be just and proper in the premises.

Dated: New York, February 11, 1955.

Yours &c.,

ARCHIBALD PALMER,
Attorney for Defendants,
Office & P. O. Address,
No. 320 Broadway,
Borough of Manhattan,
City of New York.

Affidavit of Archibald Palmer

To:

HONORABLE LEONARD P. MOORE,
United States Attorney for
Eastern District of New York,
Federal Building,
271 Washington Street,
Brooklyn 1, New York.

Affidavit of Archibald Palmer, Read in Support of Motion

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK :

—o—

UNITED STATES OF AMERICA,

against

PRIVATE BRANDS, INC. and FRANCIS P. CAREY,
Defendants.

—o—

CITY OF NEW YORK }
COUNTY OF NEW YORK } ss.:
STATE OF NEW YORK }

ARCHIBALD PALMER, being duly sworn, deposes and says:

That he has been retained as attorney to represent the above named defendants in connection with a proposed appeal to be taken from the verdict of guilty rendered by the Jury before this Honorable Court on the 7th day of February, 1955.

Affidavit of Archibald Palmer

In connection with the conversations had by deponent with the defendant Francis P. Carey, President of the corporate defendant and one of the defendants herein, deponent is fully convinced of the fact that a motion for a new trial, in accordance with Rule 33 of the Federal Rules of Criminal Procedure, is a proper and necessary remedy to take in connection with the aforesaid verdict.

Deponent has been informed of the fact, and has verified the fact that immediately after the verdict of guilty had been rendered the stenographers who had taken the testimony during the trial were employed for the purpose of obtaining, as speedily as possible, a transcript of that testimony, to be used in connection with the appeal and deponent spoke to one of said stenographers yesterday and was informed of the fact, and was advised to notify this Honorable Court that said stenographer will make the same before this Honorable Court, that it will be impossible for the said minutes to be transcribed for a period of at least two weeks and maybe as much as three weeks.

Deponent believes that errors were committed during the course of the trial in connection with the attempt on the part of the defendant Francis P. Carey to act as his own attorney after his then attorney, Jeremiah J. Driscoll, had informed the Court that he desired to be relieved as attorney for the reason given to this Court, as deponent is informed and verily believes, that said Jeremiah J. Driscoll was unfamiliar with the chemical nature of chloroform and the component parts thereof, and all matters pertaining to the situation wherein the Government made its claim concerning the acts, conduct and intent of both the corporate defendant as well as the defendant Francis P. Carey, and that he had not had sufficient time within which to study his defenses because while the Government had many months during which the defendants had supplied to the Government access to its books, records and factory set-up,

and all matters pertaining to the chloroform sold by the corporate defendant to the Government, that he had only a period of less than seven weeks within which to prepare for trial and all matters pertaining thereto, and that he was unable, during that period of time, to acquaint himself with all of the crimes alleged to have been committed by the defendants, and that the defendant Francis P. Carey desired to present his defense in person, as he was the consultant and acknowledged chemist fully familiar with all of the details affecting the alleged crimes, but permission was refused by the Court.

Deponent is informed by the defendant Francis P. Carey that various proof which he desired to offer in contradiction to the testimony offered on the part of the Government, all of which go to the question as to intent, was not permitted, as evidenced by the fact that a cost accountant was permitted to testify on behalf of the Government and when questions were asked of the accountant employed by the defendant objections were made to the same which objections were sustained.

Deponent was retained as attorney only on the 10th day of February, 1955, and in view of the aforesaid Rule 33, which reads as follows:

> "The Court may grant a new trial to a defendant if required in the interest of justice. If trial was by the Court without a jury the Court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any

other grounds shall be made within five days after verdict or finding of guilty or within such further time as the court may fix during the five day period."

it is necessary that a motion be made for a new trial within five days after the rendering of the verdict.

Under the circumstances it becomes necessary, in order to properly present such a motion that the minutes of the trial be transcribed and that reference be made to the various points which the defendants desire to raise in connection with such a motion in order that the grounds for such a motion should be properly portrayed through actual references to the minutes, as transcribed, and that mere reference thereto through the statements made by the defendant Francis P. Carey cannot bear the same earmarks of clear understanding as would the actual reference to the minutes themselves.

Deponent firmly believes that in the interests of justice and in the interests of the defendants, and particularly the individual defendant Francis P. Carey, who, up to the time of the trial, had an unblemished reputation as to his character, which was not in anywise attacked, in any shape, manner or form, by the Government, and who, believing in his own innocence as well as that of the corporation, and desiring to prove such innocence, has engaged counsel for the purpose of preparing and presenting all motions necessary in connection with appeal, to wit, motion for new trial, motion necessary for arrest of judgment, and the appeal itself, and counsel finds it necessary to acquaint himself with all of the facts, other than the statements as made to him on the factual situation by said Francis P. Carey, that an extension of time be granted so that, by a reading of the testimony, counsel can properly apprise himself of the situation and be in a position to fully explain what he believes is a proper defense.

Affidavit of Archibald Palmer

Therefore, in all fairness and justice to the defendants herein, deponent prays this Honorable Court, in accordance with said Rule 33, above referred to, to extend the time within which a motion for a new trial may be made for a period of three weeks from the date hereof, which is the extra time which will elapse before deponent obtains the minutes, makes a study of said minutes, and obtains the necessary affidavits which must be used for the purpose of submitting to this Honorable Court the reasons for a new trial.

WHEREFORE, deponent respectfully prays for the relief set forth in the annexed notice of motion, for all of which no previous application has been made herein.

ARCHIBALD PALMER.

(Sworn to February 11, 1955.)

Affidavit of Francis P. Carey, Read in Support of Motion

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

—o—

UNITED STATES OF AMERICA,

Plaintiff,

against

PRIVATE BRANDS, INC. and FRANCIS P. CAREY,

Defendants.

—o—

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

FRANCIS P. CAREY, being duly sworn, deposes and says:

That the purpose of implementing my application to this Honorable Court to extend the time within which I may make a motion for a new trial is that I desire to bring these facts to the attention of the Court.

The subject matter of my alleged wrong doing concerned the question as to whether or not I did with intent to defraud the United States, as more specifically set forth in the indictment, deliver chloroform (do not use for anasthesia) to the offices of the Armed Services Medical Procurement Agency, in connection with the contract dated December 17, 1951.

In my own defense I denied my guilt in connection therewith. In the first place, I have been in the field of manufacturing and testing drugs for a period of over thirty-three years, both as an employee and as an employer. I have

also aided in the obtaining of patents from the United States Patent Office for chloroform.

Contracts were given to my corporation, Private Brands, Inc., one in the year 1949 and two in the year 1952. All of these contracts were faithfully fulfilled and after meeting certain objections of the Government raised at the time of delivery of these three contracts, the contents called for were accepted.

In connection with the late contract of 1952, after it had been accepted and the F.B.I. Agency had come into the picture then, for the first time, I was called upon to answer to the claim made that the twenty-two shipments as against the contract of December 17, 1951, was improperly performed. In that connection a claim was made upon my corporation for the repayment of the sum of $16,000.00 and after my refusal to pay the same, on the grounds that the chloroform delivered was in perfect order and was in accordance with the specifications therefor, then came my indictment.

It is sufficient to say that in connection with my claim that the chloroform delivered, in connection with the contract of 1952, was proper, that my appeal to the Armed Services Board of Contract Appeals was denied upon the main ground that I had not in a form acceptable to that Board, made my claim for appeal against the decision of Capt. Berner. This despite the fact that we did, as we claim, make an appeal in a form which was called for by the rules and regulations of that Board. From that decision we attempted to take an appeal to the full membership of the Armed Services Board of Contract Appeals on the merits, but both our attorneys, first Mr. Casey and then Archibald Palmer, our latest attorney, were refused a hearing on that appeal on the ground of this technicality saying, however, that "this does not preclude aggrieved party from resort to the courts, however".

Affidavit of Francis P. Carey

Instead of giving me the right to prove that the chloroform refused, twenty-two shipments as against the contract of December 17, 1951, was proper and at least as good, if not better, than the chloroform received on ten separate shipments against the contract given me in 1949, I was told that the Government could use both remedies or either one. It is, therefore, necessary to know (1) that I was indicted first and I am now threatened to be sued for the repayment of the alleged monies paid by the Government in connection with the contract referred to, of December 17, 1951. I wish to remark in passing, that over one-half of the chloroform received by the Government agency in the late 1952 contract have been used and over five thousand bottles of the 1951 contract have been used in Government service by technically trained people and no complaint has been made in connection therewith. (2) It is also necessary to understand that the alleged difference which has been harped upon by Government attorneys, concerning U.S.P. chloroform and technical chloroform, is more a difference in words than in content. Technical and U.S.P. chloroform are manufactured in this country by practically only three concerns: (1) DuPont, (2) McKesson & Robbins, as Agents for The Brown Co.; and (3) Merck & Co. Technical analysis of the contents of the chloroform itself, through Bendiner & Schlesinger, of Third Avenue and 10th Street, New York City, recognized chemists of outstanding merit for over 100 years, state, in writing, that there is no real difference of any kind between technical chloroform and the self-designated U.S.P. chloroform. As a matter of fact, they have certified to the following: That the shipments against the April 1952 contracts, the alleged breach of which contract I was indicted upon, is in conformity to U.S.P. specifications within the accuracy of the tests specified and remark "can be used for the purpose intended". This report was obtained to verify our own Lab. results which were in

dispute with those of Armed Services Medical Procurement Agency. It is important to note that this report of Bendiner & Schlesinger was obtained by the defendants under date of April 24, 1952, in advance of shipping any of the lots of chloroform contained in the twenty-two shipments upon which I was indicted and found guilty.

In view of the fact that the ten shipments of the 1949 contracts were received by the Government, paid for by the Government and examined by its technicians, and in view of the fact that the April 1952 contract, following the contract of December 17, 1951, had its chloroform contents purchased by the defendants from the same source of supply, to wit, DuPont, as were the earlier contracts of 1949 and December 17, 1951. Does it not seem incredible that the defendants can be charged with any intent of any kind to defraud the United States Government in connection with its twenty-two shipments against the contract of April 1952, the subject matter of the alleged crimes! It has not been contended by the Government at this trial, or at any other time, that the final shipments actually received and paid for by the Government from 1949 up to April, 1952, was not in accordance with the specifications and in accordance with chloroform that would meet the tests of U.S.P. As a matter of fact, even in connection with the chloroform shipments in the contract of April, 1952, after it was reworked and met even the Arbitrary conditions of the United States, in addition, that chloroform also passed the tests and only after eighteen months of alleged investigation by the F.B.I. and the refusal of the defendants to pay the Government the $16,000.00 claimed, was there an indictment handed down.

To indicate to what extent the defendants sought to undertake every precaution to see that the chloroform purchased by the Government should meet the use therefor, attention is called to the fact that when the patented

seals called for by the specifications were placed in the bottles furnished the Government in accordance with its order, attention was called to the fact that these patented sealed closures would, after the bottles in question remained for a while in Government hands, effect the contents thereof and suggested that different closures be used. Attention was called to the fact that as to the samples used by the F.B.I. to indicate decomposition, that any use of the patented seals called for would bring about the same results, but despite the efforts on the part of the defendants to get them to accept different closures, they refused to do so and now your defendants are blamed for the Government representatives' refusals to heed the advice of the defendants. As a matter of fact, U.S.P. specifications provide precautions on storage and against contact with organic matter. The patentee, I am informed, advised the District Attorney of the inappropriateness of the patented seals specified by the Government, but the Government representatives still refused to even heed the advice of the patentee and since all of the Government findings regarding the claimed differentials between the U.S.P. and the chloroform supplied by the defendants were based on laboratory results after four to twenty-four months of exposure and shipment.

For the purpose of further clarification of the matters set forth herein, it is essential to refer to the chloroform contracts made between the defendants and the Armed Services Medical Procurement Agency, in the following manner:

Contract No. 1. Contract and bid on which contract was based; contract given, resulting in the final completion of said contract and payment therefor.

Contract No. 2. Bid was made in December, 1951 and the contract was given early in 1952 for 25,000 units which were initially rejected, then reworked, resubmitted and

accepted. In connection with this contract, the records indicate that there was an extension given thereon for 23,000 units, which were finally completely accepted without any further incidents and paid for.

Contract No. 3. Contract was given in 1952 and completed without any incidents of any kind as to any rejection or other matters pertaining thereto, and was paid for.

The troubles enumerated, which resulted in the indictment of myself and Private Brands, Inc., arose out of Contract No. 2, to wit, the December, 1951 contract. I was visited by a representative of the F.B.I. in May 1953, which investigation was continued by said representative up through June 1954. He was a man not versed in chemistry or in any matters pertaining to chloroform. I endeavored to explain to him the nature of commercial chloroform involved, and the reason for its use in laboratories. In an attempt to reconcile purchases with shipments on the No. 2 Contract, an overage was shown on purchases. To explain this a search of the files was made and Contract No. 3 was shown to him. Immediately thereafter a rejection on this contract was received from Armed Services Medical Procurement Agency, despite the fact that over 50% of the shipment had been used by technically trained personnel and the faults complained of would have been easily detected by such personnel in their normal use, if such faults had been in existence during this use. Therefore, it is my contention that this rejection was brought about not because of any flaws in the chloroform, but because the Government having installed the F.B.I. into the picture, wanted to play safely across the board in causing the rejection of the contract so as to give them more time to investigate my handling of the Government business in chloroform, or in any of the other transactions which I had with the Government.

Affidavit of Francis P. Carey

These transactions consist of Government purchases of the following articles:

Foot Powder (Undecylenate)
Foot Powder (Special Formula)
Hydrogen Peroxide (28% U.S.A.C.E.S.)
Hydrogen Peroxide (U.S.P.).

Attention is called to the facts (1) That all reports which show no conformity are based on analysis from six months to twenty-four months after delivery; (2) That the U.S.P. specifications provide precautions as to the conditions of storage and contact with all organic substances; (3) That the specified patented organic seals would produce the same variance, despite this and the prior use by technical personnel, all divergencies from specifications are presumed to have been present at the time of shipment.

Attached hereto and marked Schedule "A", is a Chronology of defendants' case.

All these matters should be taken into consideration at the time of the argument of a motion for a new trial to indicate the lack of intent on the part of the defendants in any wise to defraud the Government.

FRANCIS P. CAREY.

(Sworn to February 21, 1955.)

Schedule A, Annexed to Affidavit of Francis P. Carey

CHRONOLOGY OF PRIVATE BRANDS, INC. CASE

#1	Initial Contract (about 10,000)
1949	Objection to closure spec.; tech, used contamination by PBI in processing and rework.
	Completion of Contract
(#2	Bd. Dec. 1951
(1952	Contract Feb. 1952
(	25,000 bottles—Tech. used
(CONTRACTS	Initial Rejection–(1) content (2) Label
(INVOLVED	Retest on contents, including B & S
(IN INDICT-	Rework on label
(MENT	Resubmission and acceptance
(	Completion of Contract April 1952
(	Extension—23,000 units—Tech. & some
(#2	U.S.P. used
(	Completion with incident—June 1952
#3	October 1952
1952	About 10,000 units. Tech. & some
NOT INVOLVED	U.S.P. used.
	Completion with incident—Oct. 1952
2/18/53	Final rejection and demand for $16,-000.00
3/10/53	Letter of Appeal
4/ 1/53	Letter of Appeal
May 1953)	FBI check of all personnel, etc.

Schedule "A"

July 1954)	During these discussions contract #3 was disclosed. Immediately thereafter ASMPA rejected what was left—although 50% had been used by tech. personnel.
Aug. 1954	Rejection on technical grounds of appeal to Board of Contract Appeal.
Aug. 1954	Letter requesting conference on settlement.
Sept. 1954	Second letter requesting conference.
Oct. 1954	Conference with Comm. Mozzone of ASMPA; pledge of acceptance of equitable compromise.
Late Oct. 1954	Entrance of Packard, Asst. U. S. District Attorney
Nov. 1954	Grand Jury Appearance
Dec. 1954	Indictment
Jan. 1955	Trial

Judgment and Commitment

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

No. Cr-43769

—o—

UNITED STATES OF AMERICA

v.

PRIVATE BRANDS, INC.

—o—

On this 9th day of March, 1955 came the attorney for the government and the defendant appeared with Counsel and Officer of the Corporation.

IT IS ADJUDGED that the defendant Corporation has been convicted upon a verdict of guilty of the offense of violating T. 18, U. S. C., Sec. 1001 in that, within the Eastern District of New York, on or about and between December 26, 1951 and June 10, 1952, defendant corporation, through its president, submitted false documents to the Armed Services Medical Procurement Agency, to wit: bills for payment containing fraudulent statements as charged and the court having asked the defendant Corporation whether it has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant Corporation is guilty as charged and convicted.

IT IS ADJUDGED that the defendant through its President is hereby sentenced to pay a fine of $100.00 on each of Counts 1 to 21 inclusive.

Court grants stay for payment of fines until March 14, 1955.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

CLARENCE G. GALSTON,
United States District Judge.

A True Copy. Certified this 9th day of March, 1955.

(Signed) PERCY G. B. GILKES,
Clerk.

(By) JOHN J. LANE,
Deputy Clerk.

(SEAL)

Judgment and Order of Probation, May, 1953

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

No. Cr-43769

—o—

UNITED STATES OF AMERICA

v.

FRANCIS P. CAREY

—o—

On this 9th day of March, 1955, came the attorney for the government and the defendant appeared in person, and with counsel.

IT IS ADJUDGED that the defendant has been convicted upon a verdict of guilty of the offense of violating T. 18 U. S. C. Sec. 1001 in that on or about and between December 16, 1951, and June 10, 1952, within the Eastern District of New York, he, as president of a corporation, subscribed to false documents, to wit: bills for payment to the Armed Services Medical Procurement Agency as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court.

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that imposition of prison sentence is suspended and defendant is placed on probation for one (1) year, and defendant is to pay a fine of $100.00 on each

of Counts 1. to 21. inclusive and is to stand committed until fine is paid or discharged by law.

Court grants stay for payment of fines until March 14, 1955.

IT IS FURTHER ORDERED that during the period of probation the defendant shall conduct himself as a law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.

CLARENCE G. GALSTON,
United States District Judge.

Testimony

[1] UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Cr. #43769

—o—

UNITED STATES OF AMERICA;

vs.

PRIVATE BRANDS, INC., and FRANCIS P. CAREY,
Defendants.

—o—

Brooklyn, New York,
January 31, 1955.

Before:

HONORABLE CLARENCE G. GALSTON, *U. S. D. J.*,
and a Jury.

Appearances:

LEONARD P. MOORE, Esq., United States Attorney for the Eastern District of New York, By RICHARD G. PACKARD, Esq., Assistant United States Attorney, for the United States of America.

JEREMIAH DRISCOLL, Esq., Attorney for Defendants.

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[2] (The following ensued prior to the selection of the jury.)

Mr. Driscoll: If the Court please, at this time I wish to withdraw as attorney for the individual defendant Francis P. Carey, who requests that he be permitted to defend himself personally.

The Court: Is he a lawyer?

Mr. Driscoll: He is not, your Honor; and I will remain as attorney for the corporation.

The Court: That is a very unusual request. Why is it made?

Mr. Carey: I will explain that, sir. This indictment was returned the middle of last month. The allegations are most technical. The first three weeks of the ensuing time was for a legal motion. The Government did not in any way attempt to expedite that, so that we have a case of a competent layman with insufficient time to devote himself—

Mr. Packard: If your Honor please, I am very reluctant to interrupt, but I believe that colloquy of this nature should take place at the bench.

The Court: Well, I don't care. What I want to impress upon you is that you have very able counsel in Mr. Driscoll, who is fully competent to take care of your [3] affairs.

Mr. Carey: I could see that, sir. I also am in the corporation. I have a great stake in a factual sense. It would be very difficult to coach Mr. Driscoll in two or three weeks which we have had to prepare this case in the technical side. Mr. Driscoll will be faced with Government experts on technical considerations. I do not feel that he is—

The Court: Is your interest contrary to the interest of the corporation?

Mr. Carey: No, sir; it is identical.

The Court: Then I will not release Mr. Driscoll from the assignment. He will appear for both.

Mr. Carey: I would then like to be down as co-counsel with Mr. Driscoll so that I can take into consideration the technical side of some of the evidence.

The Court: You can sit at the counsel table.

Mr. Carey: I would like the right of cross examination of certain witnesses on technical subjects.

The Court: I will see. If the situation occurs for that, I may grant you permission to do it.

Mr. Carey: The only thing involved here is the inability to provide Mr. Driscoll with that background.

The Court: I am not persuaded that this is neces-[4] sary, in the light of the competence and ability of your counsel. However, you can sit at the counsel table and if there comes a time when it is necessary to cross examine, that I think you should be permitted to do so, I will let you cross examine.

Now we will draw a jury.

Mr. Carey: Can I offer an objection or note an objection?

The Court: When?

Mr. Carey: Now.

The Court: Yes.

Mr. Carey: Thank you, sir.

(A jury of 12 was thereupon duly empanelled and sworn, with 2 alternates.)

(Opening statement by Mr. Packard on behalf of the Government.)

(Opening statement by Mr. Driscoll on behalf of the defendants.)

The Court: Mr. Packard.

Mr. Packard: Ethel Weissman.

Mr. Driscoll: If the Court please, I have served upon the District Attorney's office two subpoenas for records and I would ask him to produce them now. I have never seen them. As a matter of fact, it is necessary [5] for my defense.

The Court: Have you the records?

Mr. Packard: No, your Honor, I do not. I have not the records mentioned in the subpoena in my possession and I have never had them in my possession.

The Court: Have you them under your control? Can you obtain them?

Colloquy

Mr. Packard: That I can't say unless I try to find out whether I can obtain them, your Honor. These records mentioned are some records which are subpoena claims is in the Medical Agency, and they do not happen to be records which I have requested for my own purposes, and I don't believe that they will let them out of their custody to give them to Mr. Driscoll any more than they would give them to me.

The Court: Have you made an application?

Mr. Packard: No, I have not.

The Court: I direct you to make an application.

Mr. Packard: Very well, your Honor.

The Court: And you can tell the Agency if they do not serve what has been subpoenaed, that then I will order a direct subpoena to them.

Mr. Packard: Well, I would like to point out, your Honor, that this subpoena is very sweeping and I do not [6] believe that some of the records can be obtained with any facility. For instance, one of the things requested is all laboratory work sheets and laboratory reports on all contracts between Private Brands and the Medical Agency.

Now, that would require a tremendous amount of work, I am sure, on the part of the Agency in order to produce that, and I really don't see the relevance of it.

The Court: Let them produce what they have.

Mr. Packard: Very well, your Honor, at the noon recess I will request them to produce all these records.

The Court: Yes.

Mr. Driscoll: Thank you.

Ethel Weissman—for Government—Direct

ETHEL WEISSMAN, called as a witness in behalf of the Government, having been first duly sworn, testified as follows:

Direct examination by Mr. Packard:

Q. Now, Miss Weissman, where are you employed? A. At the Armed Services Medical Procurement Agency, 184 Sand Street, Brooklyn.

Q. And in what capacity are you employed? A. I am a purchasing agent.

The Court: You are what?

[74] The Witness: Purchasing agent.

Q. And were you employed as a purchasing agent in the years 1951 and 1952? A. I was.

Q. And as a purchasing agent were you attached to a particular buying section, as it is called at the Agency? A. Yes, I was.

Q. And what was that buying section in 1951 and 1952? A. Buying Section No. 1.

Q. And were you the agent of that buying section or did you have somebody over you? A. There was an officer who was the agent of the buying section.

Q. And what was his name? A. Major Barton.

Q. And what was his first name? A. Cornelius.

Q. And as far as civilian personnel are concerned, were you the top civilian personnel in Buying Section No. 1? A. I was.

Q. And what was the function of Buying Section No. 1, Miss Weissman? A. To procure drugs, chemicals and pharmaceuticals for use by the armed services.

Q. And does that include chloroform used for medical purposes by the armed services? A. It does.

Q. Now, do you recall a particular contract for chloroform [8] which was entered into in the last part of 1951 by the Agency with Private Brands, Inc.? A. I do.

Q. Have you brought certain—I will withdraw that. Now, in connection with these contracts which the buying section makes with various outside companies for medical supplies, do you keep a file or folder in which you keep copies of all papers pertaining to that contract? A. Yes.

Q. And you have been requested today to produce certain papers from that file? A. I have.

Q Now, would you hand them over to me, please? A. (Witness complies.)

Q. Now, did you personally do the work on this contract with Private Brands to furnish chloroform? A. Not personally, no.

Q. But you supervised the work? A. Yes, I did.

Q. Now, was this contract obtained through competitive bidding? A. It was.

Q. Now, I am going to show you a paper here and ask you, Miss Weissman, what the total quantity of chloroform requested under the contract was? A. (After examining paper.) 25,824 bottles

Q. And was there any—what size bottles were those, [9] Miss Weissman? A. They were one-pound bottles.

Q. And was there any particular quality of chloroform specified? A. Yes, there was. The USP quality.

Q. I know you are not a chemist and I am not going to ask you to define it, but to what does USP have reference? A. It refers to the United States Pharmacopeia.

Q. The standards— A. The standards as set forth therein.

Q. Now, this contract which was let by competitive bidding, did you keep any records in the files which would show actually to which contractor or which company the contract in question was awarded? A. Yes, we did.

Q. What is the name of that document? A. The abstract of bids.

Q. Perhaps you could keep your voice up just a little bit. A. Yes, sir.

The Court: I didn't get the answer.

The Witness: The abstract of bids.

Q. Now I am going to show you this paper, Miss Weissman, and ask you if you can identify it for me. A. This is the abstract of bids on our Invitation No. 52-742 covering chloroform.

[10] Q. And does the abstract of bids show who the winning bidder was? A. Yes, it does.

Q. Who was the winning bidder? A. Private Brands, Inc.

Q. And what was the winning bid? A. We required two different types of packing—domestic pack and export pack. The price at domestic pack was 35½ cents, and at export pack was 36 cents.

Q. And this was all USP chloroform? A. Yes, it was.

Q. The requirement as to packing, did that have anything to do with the contents or the quality? A. Nothing at all.

Q. Now, when the bids, when invitations for bids or when bids are solicited, do you send out any documents to Private Brands and the other persons who bid on the contract? A. Yes, we send them an invitation to bid.

Q. And if they want to make a bid do they send for the invitation? A. Yes, they do.

Q. Now, do you have that invitation there? A. Yes, I do.

Q. And is that signed by Private Brands and signed by Mr. Carey? A. Yes, it is.

Q. May I have it, please? A. (Witness produces document referred to.)

Mr. Packard: If your Honor please, I am about to [11] make my first offer of an exhibit in evidence and I would like to explain to the Court that there is a purely mechanical problem involved in making the offer in evidence, and that arises from the fact that there is a regulation issued by the Secretary of the Army which forbids the release of any of the documents, files or records which are maintained in the custody of the Medical Agency.

Now, what I have done, your Honor, is to procure certified copies of all of the proposed exhibits, which are signed and authenticated first by the General File Custodian at the Agency, and secondly, by the Secretary of the Army under seal, under his official seal, and these photostats, as certified and authenticated, by provisions of the statute are admissible equally with the documents themselves.

Now to facilitate the authentication, they just have one authentication referring to all of the photostats and with a ribbon through it, and assuming no objection and with your Honor's permission, I would like to cut the ribbon, have the invitation and bid deemed marked in evidence, and then actually hand over to Mr. Scott the authenticated photostat.

The Court: May he see the bundle before you cut the ribbon?

[12] Mr. Packard: Very well, your Honor.

Do you mean to Mr. Driscoll, your Honor?

The Court: I mean to Mr. Driscoll.

Mr. Driscoll: If your Honor please, if I may be so bold to suggest to Mr. Packard that he might have an envelope that he keeps that in now so that he doesn't lose them.

Mr. Packard: I will ask my associate to keep them in an envelope.

The Court: Yes.

Ethel Weissman—for Government—Direct

Mr. Packard: At this point, if your Honor please, I ask that the original of the invitation and bid be deemed marked in evidence and that the authenticated photostat be substituted in its place.

Mr. Driscoll: No objection.

The Clerk: Government Exhibit 1.

(Photostat of invitation and bid is marked Government's Exhibit 1 in evidence.)

Q. Miss Weissman, were there any other bids submitted in this contract for chloroform? A. Yes, there were.

Q. And how many other bids were there? A. Six.

Q. And what was the range of those bids? Just give it in [13] round figures.

Mr. Carey: Let us have it exact.

Mr. Driscoll: Pardon me, Judge.

(Mr. Driscoll confers with Mr. Carey.)

Q. May I have the figures, the range for the other bids? A. Approximately 36 cents to 60 cents.

Q. Now, at the same time as the bid for chloroform USP was solicited, were there bids for other items solicited? A. Yes, there were.

Q. So that abstract of bids will make reference to other items? A. Yes, it does.

Q. But the chloroform—what number was the bid on the chloroform? A. It was Item No. 4 on the bid.

Mr. Packard: Now, if your Honor please, with respect to the abstract of bids, I propose to follow the same procedure, if I may have it.

I offer it in evidence.

The Clerk: Government's Exhibit 2.

(Abstract of bids referred to is marked Government's Exhibit 2 in evidence.)

Ethel Weissman—for Government—Direct

Q. Now, Miss Weissman, in the normal course of the Agency's Purchasing Division's business is it customary to send out an official notification to the winning bidder? A. Yes, it is.

[14] Q. And what is the nature of that notification? A. It is a notification of award which describes the item and the quantity and the price to the successful bidder.

Q. And is that sent out in the form of a letter? A. It is.

Q. And is it a standard printed form? A. Yes, it is.

Q. I will show you this paper and ask you if you can identify it for me? A. This was the notification of award to Private Brands dated December 26, 1951, which advised them that they were the successful bidders on the chloroform.

Q. Now, Miss Weissman, when these bids or when these contracts are entered into, is it the practice of the agency to assign them a given number? A. Yes, it is.

Q. And was a number assigned in this case? A. It was.

Q. And what was the number? A. 36603.

Q. And will that number in the usual course appear on all other documents connected with the contract? A. Yes, it will.

Mr. Packard: I offer the notification of award in evidence.

The Clerk: Government Exhibit 3.

(Notification of award referred to is marked [15] Government's Exhibit 3 in evidence.)

Q. Miss Weissman, at this point, as I understand it, the successful bidder has received and has in his possession the invitation for bids and the terms of the bids, and he has also gotten a notification of award. Now, does he also get a copy of the award or contract itself? A. Yes, he does.

Q. And is there—is that mailed out to him? A. Yes, it is.

Q. Now, was there any record maintained in the buying section which shows that the award or contract had been mailed out to Private Brands? A. There is a record maintained.

Q. What is that called? A. Control card of contractual documents.

Q. I ask you if you can identify that card for me? A. Yes. This is the control card distribution of contractual documents referred to Order No. 36603.

Q. And what does that tell you? A. It tells, among other things, when the contract itself was mailed to the contractor.

Q. And when was the contract mailed to the contractor? A. February 9, 1952.

Q. And by the contractor, do you mean Private Brands, Inc.? [16] A. Yes, I do.

The Court: February 9, 1952.

The Witness: Yes, sir.

Mr. Packard: I offer the control card in evidence.

Mr. Driscoll: No objection.

The Clerk: Government Exhibit 4.

(Control card referred to was marked Government's Exhibit 4 in evidence.)

Q. Now I will ask you if you can identify this paper for me, Miss Weissman? A. This is our file copy of Order No. 36603 issued to Private Brands, Inc., for a quantity of chloroform.

Q. And is that the copy of the contract? A. Yes, it is.

Q. And that has the word "award" up on top? A. It does.

Q. Is that your office terminology for a contract? A. Yes. In parentheses following it says "Supply Contract", and that is our terminology.

Mr. Packard: I will now offer the copy of the contract in evidence.

Mr. Driscoll: No objection.

The Clerk: Government's Exhibit 5.

(Contract referred to is marked Government's Exhibit 5 in evidence.)

Q. Miss Weissman, I notice that annexed to the copy of [17] the award is a paper entitled "Military Medical Purchase Description." A. Yes.

Q. Does that Military Medical Purchase Description accompany the copy of the award that is sent to Private Brands, Inc.? A. Yes, it does.

Q. And what is the purpose of the Military Medical Purchase Description? A. To describe to the contractor the quality of the supplies being procured, as well as the packaging, packing and memorandum instruction, and the reference to Federal specification.

Q. And reference is made in here to a Federal specification U. M. 186. Would you please describe to me what is meant by that? A. That is the Federal specification covering a packaging requirement.

Q. In other words, to shorten the story, it simply amplifies the requirements which appear in the Military Medical Purchase Description? A. That is correct. It gives them all information they need in order to comply with the specification.

Q. And I will now ask you if you can identify this little pamphlet for me? [18] A. This is Federal specification U. M. 186 together with Amendment No. 1.

Q. And is that the specification or the pamphlet referred to in the Medical Purchase Description? A. Yes, sir, it is.

Q. Now, are those pamphlets U. M. 186 available, readily available to contractors such as Private Brands? A. Yes, they are.

Q. And where could Mr. Carey have obtained a copy of that pamphlet? A. Well, as we state in our invitation to bid, he can obtain it from the Superintendent of documents at the Government Printing Office in Washington. However, we do have a supply at the Agency and we are very happy to give them out at no cost when they are asked for.

Mr. Packard: I am going to offer U. M. 186 in evidence.

Mr. Driscoll: No objection.

The Clerk: Government Exhibit 6.

(The pamphlet referred to was marked Government's Exhibit No. 6 in evidence.)

Q. Now, there is also another document relating to specifications which appears on this particular contract? A. Yes, there is.

Q. And what is that document? [19] A. That is the Military Standard 129 which gives the instructions for the marking of the shipping cases.

Q. You mean the outer containers? A. The outer container, yes.

Q. And does that again amplify this Medical Purchase Description? A. Yes.

Q. And I will ask you if you can identify this document for me? A. This is a Military Standard 129 covering marking of shipments.

Q. And are those similarly available to the contractors? A. Yes, they are.

Mr. Packard: I will offer this in evidence.
The Clerk: Government Exhibit 7.

(Book referred to is marked Government's Exhibit 7 in evidence.)

Q. Miss Weissman, after the contract is entered into is the usual practice of Buying Section No. 1 is it customary to forward shipping instructions to the contractor—that is, to Private Brands? A. Yes, it is.

Q. And do you retain a copy of those shipping instructions in your file? A. Yes, we do.

Q. Would you please identify that paper for me? A. These are the shipping instruments which were issued to [20] Private Brands, giving the destinations and the quantities to go to each destination of the chloroform that was awarded to them on Order No. 36603.

Q. And how many depots are there named as destinations for this particular lot of chloroform? A. There are five.

Q. And which depot does most of the chloroform go to, or which does the largest portion of the chloroform go to? A. The largest portion went to the Schenectady General Depot.

Q. And approximately how much of the chloroform went to Schenectady? A. Approximately 12,000.

Q. So almost half of it went to Schenectady, is that correct? A. That is correct.

Mr. Packard: I offer copy of the shipping instructions in evidence.
Mr. Driscoll: No objection.
The Clerk: Government's Exhibit 8.

(Shipping instructions referred to are marked Government's Exhibit 8 in evidence.)

Mr. Packard: At this time, your Honor, I think it might be helpful if I could pass the invitation for

bids and the award to the members of the jury. So I request your permission to do so.

The Court: You may do that or, if you prefer, you [21] can just tell the jury in the form of a synopsis what the exhibits contain. If Mr. Driscoll desires to add to that, he may. Whichever you want to do.

Mr. Packard: Well, there are just one or two things that I would like to point out to the jury, so I will do it in the form of a synopsis.

The invitation for bids is Exhibit 1, and I am going to refer to these photostats because I am told if I start using those I will lose one of them and I am supposed to return them all.

The invitation is on the first page. This little portion of it, the bid itself, has the name Private Brands, Inc., right here and it is signed by Francis P. Carey, President. On the next page or pages are terms and conditions of the invitation for bids. It is fairly voluminous, and many of them are required by public law to be put in.

Now, as Miss Weissman said, there were a number of items besides chloroform bid for. So we come over to the fourth item, which is the chloroform, 25,824 bottles chloroform, one pound USP, not used for anesthesia; and it makes reference in the invitation for bids to Purchase Description No. 5. The total amount involved is slightly over $9,000.

[22] The award for the contract itself—really all of these papers make up the contract—but this is sort of the clincher, and Purchase Description No. 5 mentioned in the invitation for bids is this Medical Purchase Description, which I mentioned before.

Q. Miss Weissman, under the regular procedures of the Armed Services Medical Procurement Agency, is there

a provision for inspection or testing of the quality of the contents of the chloroform? A. There is.

Q. And would you explain to us, please, briefly or generally, what that provision is? A. An inspection of unfilled material is designated in the contractor as the representative of the contracting officer for the purpose of inspection, and it is his responsibility to select samples and forward them to the agency for testing.

Q. And is he supposed to select the samples if all the bottles have been, or after the bottles have been filled and packaged ready for shipment? A. That is the point at which he selects the samples.

Q. And when he selects samples they are then sent to the laboratory, is that correct? A. That is correct.

Q. Medical laboratory of your agency? [23] A. Yes, sir.

Q. And when he sends the samples does he send a document or paper along with the samples? A. He sends a sample receipt with the samples.

Q. And does that contain a description of the particular item inclosed? A. Yes, it does.

Q. And the number of samples? A. It does.

Q. And is the sample receipt prepared by the Government inspector? A. Yes, it is.

Q. And is a copy sent to Buying Section No. 1? A. Yes, sir.

Q. And is that your identification that the samples have actually been received in the laboratory? A. Yes, it is.

Q. So that after you receive that you will know in a few days or a few weeks there will be a laboratory report along, is that correct? A. That is correct.

Q. I show you this paper and ask you if you can identify it? A. This is the Buying Section No. 1 copy of the sample receipt No. 12 RF covering five bottles submitted to the Agency of Lot No. 2049 by Private Brands under Order No. 36603.

Q. Now, this Lot No. 2049, where does that come from? A. The lot number appears on the label for each individual bottle.

[24] Q. And in that lot number assigned by Private Brands or is it assigned by somebody else? A. It is assigned by Private Brands.

Q. And you said there were how many bottles, sample bottles that were sent in under this sample receipt? A. There were five bottles.

Q. The number in the upper right-hand corner, 12 RF, do you know what the initials RF stand for? A. Those are the initials of the inspector. They all follow their numbers with their own individual initials. There is no procedure.

Q. And does this show the date on which he actually selected the sample out at Private Brands? A. Yes, it would.

Q. And what was that date? A. That was February 18, 1952.

Mr. Packard: I offer this copy of that sample receipt 12 RF in evidence.

The Clerk: Government Exhibit 9.

(Sample receipt referred to is marked Government's Exhibit 9 in evidence.)

Q. Now, Miss Weissman, in due course the laboratory, of course, makes a report as to the analysis of those samples, is that correct? [25] A. That is correct.

Q. In this case the analysis was to determine whether the chloroform met USP specifications? A. That is so.

Q. Now, after the laboratory makes out its report, does it send Buying Section No. 1 a copy or copies of the laboratory report? A. Yes, we receive all the copies of the laboratory report.

Ethel Weissman—for Government—Direct

Q. Now I am going to show you this paper and ask you if you will identify it for me. A. This is Laboratory Report No. 73128 which was issued against Order No. 36603, Private Brands, Inc., covering the results of the testing on chloroform as submitted on sample receipt No. 12 RF.

Q. And does it have the sample receipt number right on the laboratory report? A. Yes, it appears right here.

Q. So that ties your laboratory report in with this sample receipt which you have just identified? A. Yes, it does.

Q. And the contractor's lot is No. 2049, is that correct? A. That is correct.

Mr. Packard: I offer Laboratory Report No. 73128 in evidence.

[26] Mr. Driscoll: No objection.

The Clerk: Government Exhibit 10.

(Laboratory report referred to is marked Government's Exhibit No. 10 in evidence.)

Q. I am going to hand you the photostat, Miss Weissman. Would you please tell me whether the laboratory report showed acceptance or rejection of the samples? A. It showed rejection of the samples.

Q. And is there any notation on it by your boss, Major Barton? A. Yes, he made a notation.

Q. And what was the notation which he made? A. He stated "Unfit for the use intended."

Mr. Driscoll: If your Honor please, I think it is a waste of time here. You have offered that in evidence?

Mr. Packard: That is right.

Mr. Driscoll: The jury can see it. If you are going to read everything on—

The Court: You can read such parts as you want.

The Witness: It is very simple. (Continuing) "—and mislabeling could cause confusion in stock records." That was the only remark made.

The Court: Suppose you read what the witness said.

(The witness' remarks were thereupon read by the reporter.)

[27] Mr. Packard: Your Honor, there are headnotes showing the basis for rejection, and there are details. May I have permission to read to the jury just the headnotes?

The Court: Yes. Mr. Driscoll can add to that, if he wants to.

Mr. Packard: It says: "Laboratory Findings: Samples do not comply with essential requirements of applicable specification as follows:

"Labeling, Description, Specific gravity, Readily carbonizable substances, Odorous and chlorinated decomposition products."

At the present time I am not going to try to explain what those mean.

Mr. Driscoll: Could I ask you, Mr. Packard—I just listened to you like the jury—do you mean what you have read is a basis of rejection or is the actual reasons for rejection? I thought maybe those headings.

Mr. Packard: Those are headings

Mr. Driscoll: Were they all checked off as reasons?

Mr. Packard: That is correct, each and every one of them.

Mr. Driscoll: They were five bases, in other words.

[28] Q. Now, in the usual course in Buying Section No. 1 when an unfavorable laboratory report is received, is the contractor, the private persons, given an opportunity to replace the rejected lot? A. Yes, they would be.

Q. And do you send them a letter setting forth the reasons for the unfavorable laboratory finding? A. We do.

Q. And do you keep a file copy of that letter in your files? A. Yes, sir.

Q. I will ask if you can identify this for me, Miss Weissman? A. This is our file copy of a letter to Private Brands, Inc., dated March 5, 1952, in which we advise them of the results of the testing of their samples of chloroform.

Q. And do you summarize in that letter the findings as set forth in the laboratory report? A. Yes, we do.

Mr. Packard: I will offer this file copy of the letter in evidence, your Honor.

Mr. Driscoll: No objection.

The Clerk: Government Exhibit 11.

(Letter referred to is marked Government's Exhibit 11 in evidence.)

Mr. Packard: May I have your permission to read [29] portions of this letter to the jury?

The Court: Yes.

Ethel Weissman—for Government—Direct

Mr. Packard: This is dated March 5, 1952.

"Private Brands, Inc.,
"1 Pleasant Avenue,
"Clifton, N. J.
"Re OIN-36603
"Chloroform 1 Lb. USP (Do not use for anesthesia.)
"Lab Report No. 73128.

"Gentlemen:

"The samples submitted by you through the Inspector of Naval Material have been examined in our laboratory. A transcript of specification requirements and the laboratory findings are as follows:"

And then it lists in summary form the same deficiencies mentioned in the laboratory report. The letter closes by saying:

"The above deviations make the item unfit for the use intended and mislabeling could cause confusion in stock records. The material represented by your sample is therefore rejected. As your contract is now delinquent, you are advised that unless new samples are received on or before 24 March, 1952, and such samples are found acceptable, it may be necessary to procure our [30] needs elsewhere to meet Service requirements, as provided in General Provision 11 of your contract. In such event you will be liable for any excess costs incurred in such action. Please advise us by return mail if such new samples will be available on the above date.

"Very truly yours,

"C. W. Barton,
"Major."

Miss Weissman's superior.

Q. Now, Miss Weissman, did you get a reply letter from Mr. Carey in response to this letter that you sent out? A. Yes, we did.

Q. And I ask you, Miss Weissman, if you can identify this letter for me? A. This is the reply we received to our letter of March 5, dated March 7th, from Private Brands, and it advises us as to the replacement of samples of chloroform.

Mr. Packard: I offer it in evidence.

Mr. Driscoll: No objection.

The Clerk: Government Exhibit 12.

(Letter referred to is marked Government's Exhibit 12 in evidence.)

Mr. Packard: May I read this letter to the jury, your Honor?

The Court: Please do.

[31] Mr. Packard: On the letterhead of Private Brands, Inc., 1 Pleasant Avenue, Clifton, New Jersey.

"March 7, 1952.

"Armed Services Medical Procurement Agency,
"84 Sand Street, Brooklyn 1, New York.
"Reference: OIN-36603, Stock No. 1-139-000.

"Laboratory Report No. 73128.

"Gentlemen:

"Replying to your letter of 5 March, 1952, we are proceeding with replacement of this item and new samples shall be available on or before 24 March, 1952.

"We regret any inconvenience this may have caused you.

"Very truly yours, Private Brands, Inc.,

"F. P. Carey, Pres."

Q. Now, Miss Weissman, when the laboratory makes up its report and sends you a copy, does it send a copy to the Government Inspector's office? A. No. They send all the copies to us, Mr. Packard, and we send it to the Inspector's office.

Q. And after the Government Inspector's office gets a copy of a laboratory report from you, do they have any communication with Private Brands in the usual course? [32] A. Yes. They also notify Private Brands of the reason for the rejection. They don't say anything else besides that.

Q. And do they send you a copy of that letter? A. They do.

Q. So what happens is that Private Brands from two different sources gets an enumeration of the reasons for the rejection, is that correct? A. That is correct.

Q. I will show you this pink letter and ask you if you can identify it for me? A. This is a copy of a letter from the Inspector of Material to Private Brands, Inc.—it is a carbon copy to us—which reiferates the reasons for rejection of chloroform on Order No. 36603.

Mr. Packard: I offer the copy of the Inspector's letter to Private Brands which went to Buying Section 1—I offer that in evidence.

Mr. Driscoll: No objection.

The Clerk: Government Exhibit 13.

(Letter referred to is marked Government's Exhibit 13 in evidence.)

Mr. Packard: I won't bother reading this because it just repeats the information on the other letter.

Q. Now, Miss Weissman, this contract has what is known [33] as 100 per cent optional increase in quantity clause, did it not? A. It did.

Q. And would you please explain to the Court and to the jury what is meant by that clause? A. The Government reserves the right to order any additional quantities for a period of a year up to 100 per cent.

Q. So, since this contract originally provided for 25824 bottles, that would mean an additional amount of bottles in that figure, would it not? A. Yes, it would.

Q. And, Miss Weissman, this optional increase in quantity provision is right in the terms of the invitation for bids, is it not? A. Yes, it is.

Q. So that the contractor is aware of that when it enters into the contract? A. Yes, they are printed in bold letters.

Q. And did the Agency in this case exercise an optional increase in the quantity clause? A. Yes, we did.

Q. And in normal course how is that option exercised? A. It is exercised by the issuance of, in the first instance, a letter to the contractor advising him that we propose to exercise the option, and that is followed up with a delivery [34] order against the contract. It bears the same number as the original contract and it has a-1 after it to indicate it is the first order against the original contract.

The Court: Just a moment. We will take a recess now until 2 o'clock.

(Recess to 2:00 p. m.)

AFTERNOON SESSION

The Court: You may proceed.

Direct examination by Mr. Packard (Continued):

Q. Now, Miss Weissman, I believe we reached the point of the exercise of the option to increase the order up to

23,000-odd bottles, and I am going to show you this letter and ask you if you can identify that. A. This was a letter that the Agency wrote to Private Brands, Inc., on February 20, 1952, in which we advised them that we were going to exercise the optional increase clause.

The Court: Is that February 20?

The Witness: February 20.

Q. And how many bottles in this particular letter? A. In the amount of 11,616 bottles.

[35] Mr. Packard: I offer it in evidence.

The Court: What is the date of the laboratory report, Exhibit 10?

Mr. Packard: If your Honor please, the laboratory report by the notation on it was received in the Purchasing Division on March 5.

The Court: All right.

The Clerk: Government Exhibit 14.

(Letter referred to is marked Government Exhibit 14 in evidence.)

Q. And, Miss Weissman, was there another letter sent out as part of the increase in the option? A. Yes, there was.

Q. And what is the date of this letter? A. March 4, 1952.

Q. And how many bottles were mentioned in this letter? A. 12,048 bottles.

Q. So that there was a total of slightly over 23,000 more bottles? A. That is correct.

The Court: You mean in the two letters?

Mr. Packard: Yes, your Honor. The first letter provided for 11,616 bottles, and this second letter provided for 12,048 bottles.

The Court: You were limited to an amount not to [36] exceed the original 25,000?

Mr. Packard: 25,000-odd.

Q. And, Miss Weissman, both of these letters were prior to the date of the notation on the laboratory report? A. Yes, that's right.

Mr. Packard: I offer this in evidence.

Mr. Driscoll: No objection.

The Clerk: Government Exhibit 15.

(Letter referred to is marked Government's Exhibit 15 in evidence.)

Q. Now, Miss Weissman, just as the original contract or award copy was sent to the contractor, in this case in the supplemental, in the option, was any formal notification in addition to the letter sent to the contractor? A. Yes, the delivery order.

Q. And do you maintain copies of those delivery orders in your file? A. We do.

Q. And can you identify that for us? A. This is delivery order No. 36603-1 to Private Brands, Inc., ordering 11,616 bottles of chloroform.

Q. And this ties in with the letter dated February 20, is that correct? A. That is correct.

Mr. Packard: I offer the delivery order in evidence.

Mr. Driscoll: No objection.

[37] The Clerk: Government Exhibit 16.

(Delivery order referred to is marked Government's Exhibit 16 in evidence.)

Q. And there was another delivery order for the second letter, was there not? A. There was.

Q. And I will ask you if you can identify that paper? A. This is delivery order No. 36603-2 issued to Private Brands for 12,048 bottles of chloroform.

Q. And that is the same as in the letter of March 4, is that correct? A. That is right. This confirms the letter.

Mr. Packard: I offer this in evidence.

Mr. Driscoll: No objection.

The Clerk: Government Exhibit 17.

(Delivery order referred to is marked Government's Exhibit 17 in evidence.)

Q. Now, Miss Weissman, just two or three more questions. Did Private Brands, Inc., replace or purport to replace the rejected lot? A. They purported to replace the rejected lot.

Q. And were new samples selected? A. They were.

Q. And what was the lot number on those samples? A. 2081, I believe.

Q. Was the laboratory report favorable? [38] A. Yes, it was.

Q. And was Private Brands, Inc., authorized to make shipment to the various depots as mentioned on that shipment order? A. They were.

Mr. Packard: No further questions.

Cross-examination by Mr. Driscoll:

Q. Mrs. Weissman— A. Miss Weissman.

Q. Miss Weissman—pardon me—on direct examination you were questioned about you were in charge as a manager of the Procurement Division over there in Sands Street on letting contracts—you were the civilian head, and was the medical head Captain Barton? A. Major Barton was the

head of the section, the head of the Buying Section No. 1. I operated under him.

Q. Could Major Barton reject something that you accepted as a buyer in your position? A. Yes.

Q. He could? A. It was his prerogative.

Q. It was his prerogative. Did he ever? A. Reject something that I accepted?

Q. Which is generally the common procedure? A. Generally the contracting officer has the sole prerogative.

[39] Q. And that was Major Barton? A. Major Barton.

Q. And the contracts and all this that you testified to you personally handled and you would submit it to the contracting officer, Major Barton, and practically always if you accepted it it was O. K. with him? A. I wouldn't say to that last part.

Q. Well, do you want to put it in percentage?? Would he reject 10 per cent? A. I am afraid I couldn't pin it down. All I can say is Major Barton had the sole prerogative. I worked for him.

Q. And the details and so on and so forth, he was too busy a man to be worried about them and you took care of the details—do you understand what I mean? The minutia or the little things—and if he would say to you "Miss Weissman, you take this, and so forth" and "Is this all right," and if you said so he would sign the contract as the contracting officer? A. I wouldn't say that.

Q. What would you say? A. Since he maintains the responsibility as the contracting officer I couldn't pass on to what extent he took my word for anything, and I would understand that since he has the responsibility he would insure himself that everything was as it should be.

Q. To put it another way. All I am trying to find out, [40] you went through the procedure in your office—contract, letting of bids, getting back bids, like O. K.'ing one

of the bids or bids for awarding a particular contract, the sending of notice of award and so forth and so on—do you ever recollect particularly that Major Barton in any one of the steps that you enumerated that you took in any contract reversed you? A. In any contract?

Mr. Packard: I object, your Honor, on the ground that that question in substance has been asked and answered, and I also object as to the form of the question.

The Court: I will overrule it. I don't know how material this is. I think if this were narrowed down to what we are concerned with here, the machinery, and whether that followed the normal course, that would be sufficient.

Mr. Driscoll: That is what I want, Judge. I wanted to know in the normal course of business.

The Court: Why don't you ask about this order, then, and whether it covered the normal course? Did it?

The Witness: It did, sir.

Q. May I ask you then in this particular contract in any one of the steps in the normal course were you ever overruled by Major Barton that you recollect? If you do not recollect, [41] it is all right. A. No, I do not recollect any such circumstances.

Q. How long have you been working in this particular position for the Government? A. In this particular position, approximately seven years.

Q. Were you there in 1945? A. Yes, I was.

Q. Now, there was asked, the expression was used, contract for medical purposes. Do you recollect that? This particular contract that you have been discussing on direct examination—medical purposes. You have been there for over seven years. By medical purposes, a contract such

as this, does that mean for internal use? A. In my particular position I am not in any position to determine what it is used for, what the material is used for. I am not a technical person. I have no knowledge of what the material is used for. That does not constitute part of my duties.

Q. All right. But you marked and identified and were putting in here exhibits and didn't it say on the contract "Not to be used for anesthesia"? A. "Do not use for anesthesia" is part of the labeling. In a general term of medical purpose that covers a great deal, does specifically restrict the item "not to be used for anesthesia," but there are many medical purposes that it could be used for, [42] too, I imagine.

Q. Have you any idea what it was to be used for? A. I couldn't know that.

Q. You don't know? A. I don't know.

Q. But the contract specified— A. It merely specified not for anesthetic— not for anesthesia.

Q. This term for medical purposes, I am not sure the jury would know what we mean by medical purposes. I want to clarify that. You received in your position, as I recollect, five bids for this particular contract? A. Five or six.

Q. One of which was Private Brands, Inc.? A. Yes.

Q. You also stated, in answer to a question by Mr. Packard, that the bids, those five or six bids, the price varied from 30 cents to 60 cents. Do you remember that? A. I think I said 36 cents.

Q. Thirty-six cents to 60; I am sorry. Thanks for the correction. Could you tell me how much below the other bids the Private Brands Corporation bid was? A. Yes. I think in one instance it was about, possibly six mills below.

Q. Six mills below? A. I think the second low bidder started somewhere in the neighborhood of 36.6 or 37—I am not quite sure—but a reference to the abstract—

[43] Q. In other words, Private Brands, Inc., bid 36 and the next lowest 36-so-and-so? A. Or something close to it.

Q. And the highest was about around 60 cents? A. Somewhere in that area, yes.

Q. Would any vendor, or shall we call them bidder, on such a contract know what the other bidders' price was? A. Yes, they would. The bids are read aloud at the time of the opening, which is specified on the invitation for bids. The bid officer reads them aloud and anyone who is present will know.

Q. So that the six bidders could be present and they all know what everybody bid? A. That is so.

The Court: But that information was not available before the bids were opened?

The Witness: Oh, no, sir. They are kept under lock and key before the bids are opened.

Q. Now, are abstracts of previous bids on similar material, the purchase of similar material by the Government available prior to the bid?

The Court: Available to whom?

Mr. Driscoll: Possible bidders or vendors.

A. If a vendor knew the bid number under which a previous [44] purchase had been made, that information would be available.

Q. To a man? A. Yes. I believe they kept a file of that in the lobby of the building, and if he knew the bid number he would be able to get that information.

Q. In other words, if I a year ago had made a bid under a certain bid number and now I want to bid under the same bid number— A. You could not bid under the same bid number.

Q. Well, bid for the same type of matrial, let us say, I could avail myself of that information you mentioned. That is how I would bid on this one?

The Court: What the witness means, and I am sure what your question is designed to bring out, is the information is available. That does not control the bidding.

Mr. Driscoll: No, no. I just want to know, I am trying to make up a bid for this contract, but I know prior thereto there are certain papers for the sale to the Government—

The Court: Then, of course, Mr. Driscoll, I don't want to interfere too much with your cross-examination, but if the files disclose bids for similar material in prior years, I don't know how valuable that would be without information as to whether the market price generally [45] had or had not changed.

Mr. Driscoll: That's true.

Q. Now, have you ever met Mr. Francis P. Carey? A. Have I ever met what?

Q. Met him personally. A. Not to my recollection, sir.

Q. Have you ever met any officer or employee of Private Brands, Inc.? A. I believe I have.

Q. Do you recollect the name of the party? A. Not offhand. In the normal course of business I meet many representatives of contractors.

Q. Do you remember whether it was an officer or some other type of employee of the corporation? A. I wouldn't remember anything specifically. If you mention the names, possibly I would be able to let you know if I ever met them.

Q. Did you ever meet a Mr. Carlton Sawyer? A. Yes, I have.

Q. Was there any way in which Private Brands, Inc., could become aware that their bid was considerably low

and underpriced and they stood an excellent chance to submit a bid higher than the one they did and yet obtain the contract?

Is that too involved? A. I am afraid I lost you there a little bit.

Q. All right. Is there any way in which Private Brands, [46] Inc., could become aware that if they bid—take, as an ordinary example, they bid 40 cents, they also could get the award—and if they bid 46 they would still be the low bidder? Is there any way of doing that? A. Well, I think the only time they could know that is after the opening when the information was made public as to what the competitive bids were and then they could see how far away their bid had been.

Q. Possible effect after the event, in other words. In other words, after the bid was in and accepted? A. There is no other way of knowing what other people bid on it until that time.

Q. Now, on these purchase orders that we spoke about, what type of closure was specified? Do you know what I mean?

Mr. Packard: I object to the form of the question, your Honor. There has been no testimony as to purchase orders.

Mr. Driscoll: Maybe it is a misnomer.

The Court: If she is able to answer the question, she may.

The Witness: I am afraid there is confusion on my part.

The Court: Do not answer it.

Mr. Driscoll: Do not answer it.

[47] Q. Maybe if I use the word on the contract which was made, or you call it an award. A. That is right.

Ethel Weissman—for Government—Cross

Q. Is there any spec or specification, let us call it, which shows what type of closure—

The Court: What type of what?

Mr. Driscoll: Type of closure. These are bottles, if your Honor please. They are capped. If the material is in them they have a cap on the top of the—

The Court: Well, that explains to the Court and jury what you mean by closure?

Mr. Driscoll: Yes. The specifications as to closure appear in the Military Medical Purchase Description which is attached to the award, and it is further delineated in Federal Specification 186 and Amendment No. 1. The full description appears in those places.

Q. You refer to it in U. M. No. 1 and then annexed the purchase description in a certain pamphlet, manual that requires so-and-so. Now, was that— A. No, that doesn't quite state it. In the purchase description which is attached to the award?

Q. Yes. A. The description as to closure will appear and any further amplification will be found in U. M. 186.

Q. Which is not attached to the contract but you can and [48] do refer to? A. That is correct.

Q. Now, was there in this—do you know in this award and everything indicated that you have specified, do you know what the type of enclosure was specified for this contract? A. If you will get the award I will look at the purchase description and refresh my memory.

The Court: Well, the copy of the contract would give it. That is Exhibit 5.

Mr. Driscoll: Exhibit 5.

Q. I show you Government Exhibit No. 5— I do not think the pages are numbered, but this particular sheet says "chloroform, do not use for anesthesia"—and read the E-1b(3)a. A. Paragraph E-1b(3)a, general characteristics, is the same paragraph that is similarly numbered in Federal Specification U. M. 186 and any place where I say "delete" or "insert" it refers to that identically numbered paragraph in Federal Specification U. M. 186, so that to make sense of this you must read this together with Federal Specification U. M. 186.

Now, this reads: "General Characteristics. Second line delete 'plastic' and substitute 'phenol-resin.' At end of fourth sentence delete period (.) and add parenthetically: '(such as cork or cork compound).' A Filmaseal type inner seal shall be used with plastic closure. In lieu of plastic cap, the following closure may be used:

[49] "Each bottle shall be securely stoppered with a metal, continuous-thread screw cap, properly cushioned, and having a liner impervious to the contents. The metal caps shall be coated inside and outside in a manner to prevent corrosion. The cap liner shall be cork or composition cork not less than 1/16 inch thick, faced with tinfoil not less than 0.0015 inch thick. In addition to the above, each bottle shall have an inner seal to cover and adhere to the mouth of the bottle. Inner seal shall be impervious to the contents."

That is the end of that paragraph.

Q. Now, from a reading of that, do you know whether or not in order to fulfill that spec, let me call it if you will, spec, specification, there was a patented closure that could only be bought from the patentee? A. I would not be able to tell from examination of this.

Q. Could you from an examination of something else that is in evidence? A. No, I do not think I am technically qualified on that score, sir.

Q. Fine. Now, were shipments in this particular contract that we are discussing on Government or commercial bills of lading? A. I believe they were on Government bills of lading.

[50] Q. Did not Private Brands, Inc., then surrender material—chloroform—turn over and surrender material under the contract to the Government at Clifton, New Jersey? A. They surrendered it to the carrier at Clifton, New Jersey.

Q. And the carrier was the agent of the Government? Right? In other words, turned over possession at Clifton as soon as your carrier, the Government carrier, took possession.

Mr. Packard: I object to the question, your Honor. It is speculative. There is no testimony on direct examination as to who would even know or indicate that the carrier was anything but a private carrier?

The Court: If the witness knows, she may answer. If she does not know, all she has to do is to say "I don't know."

A. I don't know.

Q. Do any of the exhibits of the Government that have already been marked in evidence indicate whether or not the person, the shipper, or call him the truckman or anything else, that took over possession on delivery at Clifton from the defendant, whether he was a Government truck or otherwise, was he an agent—do you know what I mean by agent—of the Government?

Mr. Packard: I object to that, your Honor, on the ground that it is argumentative. The witness has already [51] testified that she doesn't know.

The Court: She could say whether any of the exhibits to her knowledge recite that.

The Witness: I really do not know whether they do or they don't.

Q. Now, you testified as to inspectors, Government inspectors, Government inspectors, and they were solely selected by the Government, is that right? They were Government employees A. Yes, they are Government employees.

Q. The defendant in this case had no voice, had nothing to do with what inspectors came into the plant to inspect under this contract, would he? A. Not to my knowledge, he wouldn't.

Q. He also had nothing whatsoever to do with the way the inspectors sampled, how many samples he took, or what he did when he came to inspect the material? A. Not properly he wouldn't.

Q. I am always talking properly. Nothing was improper.

The invitation to bid that you referred to, is that considered by the Government as a part of the contract itself? A. Yes, it is. When it is accepted, and not before.

Q. The invitation to bid is one thing. Then it is accepted. Then a contract or award is let. Right? So that [52] all of that is considered the contract part and parcel? A. I believe that is so.

Q. One uniform contract. You mentioned, as I recollect —and if I am mistaken I want you to correct me, because we can all recollect differently—as I recollect, there was some testimony from you as to mislabeling. Do you recall that? A. In quoting from a laboratory report.

Q. Oh, yes. You were reading from exhibits, I believe, and there was some question, as I recollect, of numbers—N-1? A. The preceding stock number.

Q. Yes, that stock number. Do you remember that? A. Yes. I remember that.

Q. Do you remember reading that? A. I didn't read it at this point, but I remember it.

Q. And it is part of your occupation and your position to read those things? A. Yes.

Q. You know what they indicate? A. Yes.

Q. I want to ask you, for the seven years that you have been there in that position that you are in, was chloroform USP spec ever purchased under this stock number that you referred to? [53] A. It was always purchased under the same stock number.

Q. What was that number? A. 1-139-rrr.

Q. And you referred to in this case the fact that it had N-1-. What is the significance or, if you will, what is wrong with the fact that it was called 1-so-and-so, and this one had N-1? A. At one particular point the Agency was doing a great deal of procurement for foreign aid. The Agency to differentiate material destined for military depots versus those destined for foreign countries going into by way of embarkation, which are in fact military depots anyway, but in turn being reshipped—to differentiate foreign aid material the letter N was prefixed to the stock number.

Q. I see. So that if, as you say, in this case a spec has 1-66679 and you found that it had an N in this particular shipment, N-1, the only difference was that it might confuse your records because N would designate a foreign shipment whereas without the N it meant a domestic shipment? A. Well, when you say domestic shipment, if you don't mind I would like to correct it to military shipment.

Q. Military shipment. A. The difference was that the N number is to identify going overseas and material for foreign aid. No letter preceding the stock number was regular military material. It had no [54] bearing on the material itself. It is a record to keep track of the quanti-

ties for foreign aid and quantities destined for the United States.

Q. In other words, it was not a damaging error, or violation of the specification, if you will? A. It was a violation of the specification.

Q. Technically. A. It was a violation of the specification.

Q. I show you a paper and ask you to look at it. Look at the label, sample label attached thereto.

The Court: Is that an exhibit?

Mr. Driscoll: No; I am hoping to have it as an exhibit.

The Court: Now what is the question?

Mr. Driscoll: I am sorry. I thought she was reading.

The Court: Are you ready for the question?

The Witness: Yes, sir.

Q. Now, was there ever a contract drawn with that specification that we are referring to as to labeling, markings in it, which was made, awarded to a contractor, and delivery made with that label on it and no objection made? A. Are you asking me if Private Brands ever had a previous contract with this item wtih the N number in front of it? Is [55] that what you are asking me?

Q. No. I am asking you if it had a contract without the N, the specs that we have got, say, and the contract was filled with N-1-1 and there was no objection to it, no rejection because thereof? A. I don't believe we had a contract which specified 1-139-000 which was fulfilled by material labeled N-139-rrr.

The Witness: May I amplify that last answer?

The Court: Mr. Driscoll, the witness wants to amplify the answer.

Mr. Driscoll: All right, if you will. Just wait a second.

(Mr. Driscoll confers with Mr. Carey.)

Q. Yes. I am sorry. You wanted to amplify something. A. I wish to amplify my last statement, Mr. Driscoll, by stating that to my recollection Private Brands, Inc., did have a contract previously for Stock No. N-139-000 which was fulfilled by the Stock No. N-139-rrr.

Mr. Driscoll: That is right, I just discovered that myself, and I was just going to bring that up.

Mr. Packard: May I interrupt for a moment, if your Honor please. I do not like to interrupt Mr. Driscoll's cross-examination, but I have a short witness who came from out of town, from a considerable distance, and I [56] would appreciate an opportunity to put that witness on.

The Court: All right, you may step down.

(Witness temporarily excused.)

Mr. Packard: Mr. Hendrixson.

PHILIP R. HENDRIXSON, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct examination by Mr. Packard:

Q. Mr. Hendrixson, what is your present position? A. I am service manager of the Chlorine Products Division, Electrochemical Department of du Pont.

Q. And where are you employed? What is your present address? A. Wilmington, Delaware.

Q. And what is your professional—what is your profession, Mr. Hendrixson? A. I am a chemist.

Q. And how long have you been employed at du Pont? A. Eighteen years.

Q. And how long have you been employed in your present position? A. Nine years.

Q. And prior to that, in what capacity were you employed at du Pont? A. Well, prior to my current job I was in charge of supervision [57] of production of chlorine products, and prior to that my first job with du Pont was in connection with experimental laboratory work on chlorine products.

Q. Is chloroform a chlorine product? A. Yes.

Q. What are your duties in your present position, briefly? A. Well, I am in charge of technical liaison between the group in our department that manufactures chlorine products and the group in our sales department that sells chlorine products.

Q. Mr. Hendrixson, what is meant by chloroform of USP quality? A. That designation is chloroform which meets all of the specifications listed in the U. S. Pharmacopeia.

Q. And in order to be entitled USP chloroform, does it have to meet each and every one of the specifications in the Pharmacopeia? A. Yes.

Q. Does du Pont manufacture USP chloroform? A. Not now.

Q. Did it use to manufacture USP chloroform? A. We did, yes.

Q. And on what date or approximate date did du Pont discontinue the manufacture of USP chloroform? A. It was early in the year of 1951.

[58] Q. Does du Pont manufacture any other brand or quality of chloroform? A. We do.

Q. And what is that? A. Technical chloroform.

Q. Does du Pont have any specifications or tests for the technical chloroform which it manufactured in 1952 to date? A: Yes.

Q. And when was the last time or approximately the last time when those specifications were changed? A. Our technical specifications haven't been changed since 1948.

Q. So that in 1952 the specifications for technical du Pont chloroform were the same as they are today; is that correct? A. That is right. Yes.

Q. Now, do du Pont's specifications for technical chloroform differ in any respect from specifications for USP chloroform set forth in the Pharmacopeia? A. Yes, they do.

Q. And could you tell me in what respects they differ? A. Well, the differences include the specific gravity, that is the weight of the material and the type of stabilizer that must be used, what produces on a test with sulfuric acid to show discoloration, and there are some tests in the U. S. [59] Pharmacopeia for chloroform that are not in any way included in the technical du Pont.

Q. So that du Pont technical does not purport to meet those specifications that are set forth in the USP, the last one you mentioned? A. No, sir.

Q. Now, speaking of this stabilizer you mentioned, Mr. Hendrixson, what is the function of the stabilizer in chloroform? A. A stabilizer protects the material against the adverse effect of light, heat and air. In other words, things that might tend to decompose it.

Q. And do the specifications for USP chloroform set forth a specific stabilizer? A. Yes.

Q. And what is the stabilizer required for USP chloroform? A. Ethyl alcohol.

Q. And is there any quantity specified in the Pharmacopeia? A. The Pharmacopeia specifies that it must con-

tain between one-half of one per cent and one per cent ethyl alcohol.

Q. What is the stabilizer in du Pont technical chloroform? A. Amylene.

Q. And is there any quality specified under that regulation [60] for the quality of amylene in du Pont technical? A. Yes, there is.

Q. And what is the quantity, Mr. Hendrixson? A. We specify between 2/100 of 1 per cent and 3/100 of 1 per cent by weight of amylene.

Q. So that there is not only a difference in quality or in the nature of the stabilizer from USP, but there is a considerable difference in the quantity, too, is there not? A. Yes, sir.

Q. Now, does amylene have any of the properties of alcohol? A. No, it is a different compound; it is a different category compound.

Q. Now, under the specifications set forth in the Pharmacopeia, Mr. Hendrixson, what is the specific gravity of USP chloroform? A. The U. S. Pharmacopeia specifies that it shall be, that the specific gravity shall be 1.474 to 1.478 at 25 or 25 degrees centigrade. That is a range.

Q. And under the specifications for du Pont technical chloroform, what is the specific gravity of du Pont technical? A. 1.478 to 1.482 at 25 over 4 degrees centigrade.

Q. Mr. Hendrixson, what is the explanation for the higher specific gravity of du Pont technical as compared to USP chloroform? [61] A. It is a matter of the different amount of the stabilizer used. As we have said, alcohol or amylene are the two stabilizers in question and each one is light in weight, and we have half of 1 per cent of alcohol in USP; whereas the amount of amylene in technical is so much less. Therefore by having less weight of material, the overall weight of the chloroform would be higher.

Q. Mr. Hendrixson, in your former capacity as supervisor of the production of chlorine products, did you have

supervision of the manufacture of both technical chloroform and, prior to 1951, when USP was discontinued, did you supervise the manufacture of USP chloroform? A. Yes.

Q. And, Mr. Hendrixson, did the price which du Pont used to charge for USP chloroform, was that different from the price which it used to charge for technical chloroform? A. Yes. It was greater.

Q. Was it substantially greater? A. Yes, it was quite a lot greater.

Q. What would be the explanation for the reason for the higher price of USP chloroform? A. Well, under the procedure that we use to manufacture the product, we used more space in the refinement, purification and finishing off of the product.

[62] Q. Now, Mr. Hendrixson, I am going to show you this paper, a copy of a letter, and ask you have you ever seen that copy of that letter before? A. Yes, I have.

Q. Now, without telling us to whom it is addressed or any of the details in the letter, would you please tell us as to what the general nature of the information contained therein is? A. It appears to be analytical results relating to specifications for numerous lots of chloroform technical.

Q. Are you familiar with the specifications for du Pont technical chloroform? A. Yes.

Q. And do the results of the tests shown in that letter conform to the specifications for du Pont technical chloroform? A. Yes, they do.

Mr. Packard: I am going to ask that this copy of a letter be marked for identification.

(Letter referred to is marked Government's Exhibit 18 for identification.)

Q. Mr. Hendrixson, in dealing with a liquid form such as chloroform, what is meant generally by the word "lot"?

What does that convey? A. Well, in all forms of chlorine products a lot represents a [63] practical amount that can be identified by one representative sample.

Q. In other words, Mr. Hendrixson, if you take a portion of chloroform from one part of the lot it should be uniform with a portion taken from any other part of the lot is that correct? A. Yes. We would establish our lot sizes based on our ability to be sure of a representative analysis.

Mr. Packard: No further questions, your Honor.

Mr. Driscoll: If your Honor pleases, Mr. Carey would like to cross-examine.

The Court: No. He can give you whatever questions he wants you to put and you can put the questions.

Cross-examination by Mr. Driscoll:

Q. Now, Mr. Hendrixson, you qualify yourself, I haven't any doubt, as being an expert in the field that we are discussing. I want to ask you in your experience and in the position you now hold you must be—or let me ask you, you must be familiar with production specification sheets? A. Yes. Of our own.

Q. Of your own? A. Yes.

Q. Well, is there a difference between production specification sheets between you and somebody else? A. Well, du Pont has specifications for its own production. [64] I am familiar with that.

Q. Yes, but isn't it a fact that some contractors to fulfill a contract with the Government may purchase certain material from you and sell it to the Government? A. Oh, yes, that is possible.

Q. Now, can you give us a general—I know you are in a hurry and so forth—give us as succinctly as possible for

the jury so that they will understand what do these sheets mean? What are they?

The Court: What sheets?

Mr. Driscoll: Production specification sheets that they are referring to, your Honor.

A. Well, whenever a company has a product that they expect to sell it has to be described, and the way you describe a chemical product is by what we call specifications which shows in what range it falls, how much does it weigh, is it acid or is it alkaline, does it smell unusual, does it have a color, does it contain water. And those things become specifications. In other words, if you were making chloroform you would have to be able to tell what elements it met, the same as if you were buying a supply of groceries. Everything has to be made according to the specifications, which are elements of quality. You try to set up some uniform standard or specification which will adequately describe your product. That is the way I would [65] say, sir.

Q. All right. I think they understand what you mean. And in your production spec sheets it would say not more than 95 per cent of so-and-so lot, or some such terminology? A. It would give a range.

Q. Yes. For instance, like I have seen some products which had the lower, not more than 75 per cent of this type or this compound or this chemical substance as a specification. That would mean that you could have 100 per cent, 99, 98, 97, but it is not 92. A. You could have a minimum.

Q. It is generally not more than or a minimum and so forth and on? A. It is better to set a gradual range, if you can.

Q. If I said nothing less than, guaranteed nothing less than 95 per cent of—I am trying to remember some chemical term myself. A. That would be a specification.

Q. It would mean that you could have between 95 and 100, it would meet the specification, but if you had 92 per cent it wouldn't? A. You would fulfill that particular spec if you fulfilled all the rest of that.

Q. Now, is there an allowable deviation in percentages—[66] let me put it that way—of certain compounds, what is in a compound—let me put it so the jury will understand what I am driving at. If I wanted to mix orange juice and lemon juice and the specifications said two parts orange juice, six parts lemon juice, and it was 2¼ orange juice and 4¼ lemon juice, it would be a variation under the spec for two and six? A. Your spec would have to spell out what the variance could be, if you wanted to get it exact.

Q. The spec would, but isn't it done by, like—take USP that we are talking about—specs as USP so-and-so on? A. Yes.

Q. And doesn't USP have a variance? It is not exact? A. It states exactly what the variance can be.

Q. That is what I mean. A. That is right.

Q. So that even there, even in USP, they allow a variance that I am trying to very ignorantly illustrate by the 2 and 6. A. USP states exactly what it has to be, yes.

Q. That is right. So that if there is a variety it is between that range. It could be a centimeter and it could be a very small amount, but there is nothing exact? A. Whatever the spec shows.

Q. And as long as the spec refers to USP, it is all right? A. Yes.

[67] Q. And the fact that there is a very negligible, minute deviation, would you as an expert or a man in business say it was intentional deceit to get away with something, or something like that?

Mr. Packard: I object to that.

The Court: I think that is a little speculative. You will have to narrow the question.

Q. All right. As an expert, if a spec said definitely not less than 2.15 of a certain compound nor more than 2.30 and the analytical test showed 2.301—now that is a thousandth, as I recollect it, higher than the maximum allowable—would that in your opinion be a deliberate attempt to sell something or deliver to somebody else something that they didn't—

The Court: You will have to identify the commodity. What are you talking about? Orange juice or—

Mr. Driscoll: No; chloroform, to be honest with you. I didn't want to use technical terms. They wouldn't understand what I mean.

The Court: But you have got to use a commodity.

Q. All right, put it chloroform. I don't say I am giving you the exact spec, but suppose it said for chloroform it should be no less than 2.10 nor more than 2.30 and the analytical report shows it is 2.301. If that were a fact in chloroform, [68] would you say that that would be proof of an attempt to deliver something and obtain money for it intentionally to defraud?

Mr. Packard: I object, your Honor, on the ground that it is speculative.

The Court: No. It isn't sufficiently definite. In connection with the manufacture and sale of USP chloroform. Now, if you put your question with that added phrase, the witness may answer.

Mr. Driscoll: I agree. I didn't use the USP.

Q. If USP spec said that there was a variation for that compound. A. You said between 2.10 and 2.30 as your specification, how you would come out with 2.301?

Q. That is right. A. Now, on that exact basis I can only tell you what we go by in our company. 2.30 is 2.30 until you reach 2.305. In other words, it depends on how many decimal points you have out there.

Now, as far as trying to relate the intent, I think that is a pretty hard question to answer.

Q. In other words, what you have just told me is that if you get a delivery of 2.301, say, anything up to 2.305, nobody would object to it? [69] A. That is 2.30. In other words, 87 degrees if you don't put in any—

Q. Zeros? A. You don't put any zeros after it. Eighty-seven degrees is 87 until you reach 87½.

Q. And you said it went to 2.305? A. Then it goes out of the spec.

Q. But if it were 2.301, it wouldn't be? A. That would be the same as 2.30.

Q. The same as if the spec said 2.30? A. If the spec said 2.30, then it can be—

Q. If the spec says 2.30—

Mr. Packard: I object on the ground that counsel is arguing.

The Court: He is not arguing. He is trying to understand.

The Witness: Just straight arithmetic.

Q. All right. I just want you to say it again so that the jury understands it. I am not trying to argue with you. A. I gather what you are trying to say to me is that if something has to be 100 and you see it has to be 100, that is all you see until it is 100½. It is still 100. If it is to be 100.01, it cannot be 100.1. It has to be 100.05.

Q. In other words, what I call a negligible variance on that decimal percentage? [70] A. I don't think it has any relationship to technical ability; it is just arithmetic. I guess I am on the right track. I don't know.

The Court: You can't put a general question of that sort and have it termed relevant. The witness has got to know the conditions under which the variations relate to a specification on the particular commodity.

Mr. Driscoll: That is right. That is why I am on the chloroform. That is the specification and there is a variance.

The Court: The witness has already told you that your question which asks for a conclusion with respect to intent, he said he can't tell you from that.

Mr. Driscoll: No. All I wanted to know is in his business dealings, and so forth, and now you have answered the question as far as I am concerned. Thank you.

Q. I show you a specification sheet for paraformaldehyde of the du Pont Company. Are you familiar with this specification? A. No, sir.

Q. Well, fitting it in with your background and experience and your position, are you able to discuss some questions with regard to it? A. I know that we have the product in our classification, but [71] not in the division in which I work. That is why I am not acquainted with this. I am in the Chlorine Products and this is in the Paraformaldehyde Products, but I can see that it shows specification for—

Q. All I want to do, and you will see the description there about content not less than something I was discussing before with you. A. Yes.

Q. Does it say formaldehyde content not less than 95 per cent? A. It says minimum 95 per cent formaldehyde by weight, yes.

Q. Now, that product, that chemical we are discussing, if you found a variance in a test—wouldn't it be on something over 95 per cent?

Philip R. Hendrixson—for Government—Cross

The Court: Mr. Driscoll, I can't admit an examination of that sort. We are not concerned with formaldehyde.

Mr. Driscoll: No. The only reason I asked this one—one of the reasons I asked this one was because as an explanation of what we tried to explain before when we talked about variance 95 to 100.

The Court: I think you will have to keep to the subject matter.

Mr. Driscoll: If your Honor please, the reason I [72] want to ask this question, the purpose of it is to show that Government chemists who analyze a product allow a variation, and in this case I am referring to formaldehyde. Of course, the case at bar is a different substance called chloroform—

Mr. Packard: Your Honor, I have to object to this.

The Court: I don't like objections to come in the middle of a statement or question. I can't rule on such an objection.

Mr. Packard: I apologize, your Honor. I am sorry.

The Court: Go ahead, Mr. Driscoll.

Mr. Driscoll: My client, one of my clients, Mr. Carey, says that he wants to show from this expert that the Government inspection will, or, rather, the material will pass Government inspection, and since he has nothing with reference to chloroform, he allows them to use formaldehyde, the substance that they found with a variance of between 95 and 100.

The Court: Mr. Driscoll, the Government raised the objection to the question that you put and I have to rule the question as not calling for material and relevant matter. If you limit your question to chloroform, why you may go ahead.

Q. Now, you have testified as to du Pont Company specifications [73] on chloroform? A. Yes, sir.

Q. Do you know a firm called Merck & Company? A. Yes.

Q. Will you take a look at that paper? A. (Witness examines paper.)

Q. Do you recognize that as a quality standard manual of Merck & Company for chloroform technical A. Well, I guess it is. It is a specification, and I am trying to find where it says Merck. Yes, here it is.

Q. It is right on it. A. Yes, it is a specification for chloroform.

Q. Now, you will concede, won't you, that Merck & Company are well known? A. Oh, yes.

Q. Pharmaceutical company of great repute? A. Yes.

Q. And they are just as careful and precise as to their specs as du Pont & Company? A. I imagine they are, yes.

Q. Now, on that Merck & Company specification, on the specific gravity range— A. Yes.

Q. What does that show? A. It says the specific gravity—

Mr. Packard: I will object to the question on the ground that Merck & Company is obviously irrelevant to [74] the inquiry and I don't see how Mr. Hendrixson can testify as to the practice of Merck & Company.

The Court: I will sustain the objection.

Q. Now, Mr. Hendrixson, as an expert witness, expert as regards this technical matter, if I were to tell you something that you undoubtedly know, that specific gravity range under USP spec shows 1.474—I believe you have already testified to that—to 1.478, and if I were to tell you that Merck & Company spec for specific gravity range

shows 1.474 and 1.480, would you call a product from Merck's which was 1.476 and such a product was delivered under USP spec a fulfillment of the specification?

Mr. Packard: I make the same objection, your Honor.

The Court: Sustained.

Mr. Driscoll: On what ground, Mr. Packard? What is the basis?

Mr. Packard: His Honor has sustained the objection.

Mr. Driscoll: Could I ask—

The Court: A critical issue in this case is whether the defendant corporation and the individual defendant complied with the contract that they entered into with the United States Government and the USP referred to is the reference to the regulation of the United States, and what Tom, Dick and Harry think of that variation is of no [75] importance. The Government has a complete right to insist on compliance with this specification.

Mr. Driscoll: That is right, Judge.

The Court: Now if you want to get Merck and some other expert to take the stand and testify why their variation is within the limits set in USP, why go ahead and do it, but you are not going to do it through Mr. Hendrixson.

Mr. Driscoll: All right, your Honor. First, I thought I could use him as an expert who is qualified instead of bringing in another expert to testify to the same thing.

The Court: Mr. Hendrixson hasn't been examined with respect to what the practice of Merck is, and I am not going to permit him to assume what you read sets forth what they did in their laboratory.

Mr. Driscoll: I see the point. If I have somebody from Merck they may testify as to their spec.

The Court: That is a different thing.

Mr. Driscoll: On that basis, I agree with you.

Q. Now, Mr. Hendrixson, in the du Pont Company who decides, if you know, whether or not a USP label can be put on a product? A. Well, we would only make that decision on any of our own [76] products that were made in accordance with USP specs, but you are asking me who decides on du Pont specs?

Q. Yes. A. In other words, who decides in du Pont whether a product is labeled USP?

Q. Is going to be sent out of the plant labeled USP. A. Well, it would be a matter of joint approval from research and production and sales. It would be a matter for signatures by responsible people from each group.

Q. In other words, an official of your company would have to initial it USP on that basis? A. Oh, certainly. A member of the sales, research and production, a member of each one would have to.

Mr. Driscoll: That is all, sir.

Mr. Packard: Thank you very much, Mr. Hendrixson.

(Witness excused.)

ETHEL WEISSMAN resumed.

Cross-examination by Mr. Driscoll (Continued):

Q. Did Major Barton ever award or did the Government through Major Barton ever award contracts to Private Brands, Inc., without a formal bid? A. Without a formal bid? I couldn't say. I really don't [77] know.

The Court: You don't know of any?

The Witness: I don't know of any, sir. I couldn't say whether he did or didn't. There may be.

Q. Well, there may be. You would know about it because it would have to go through you as well as Major Barton, wouldn't it? A. Are you trying to bring out were there any contracts initiated under negotiation rather than formal bidding?

Q. Yes. Suppose I should say to you wasn't a contract made by the Government without formal bidding for Special Formula No. 5 foot powder? A. I would say there is a possibility, if we bought such an item, that we could have bought it under negotiation.

Q. Up to as much as $100,000 worth? A. I am merely saying if we bought such an item. I have no recollection.

Q. No. But that could happen and you have no recollection of knowing about it?

The Court: The witness says she does not know. The if things are not good.

Mr. Driscoll: I have one more question, your Honor, and I have to get one of these exhibits.

Q. Miss Weissman, that, I believe, is called the bid [78] abstract, Government's Exhibit No. 2. Does that have the various bids to six people? A. Yes.

Q. I want you to look at the bid from five and six bidders, and we won the bid. Did you say the next highest bid above the winning bid was six cents or six-tenths of a cent—decimal six or six decimal? A. I believe I said something about six mills.

Q. Is that so? A. But I said approximately and I thought it was a small range, something like that.

Q. What is it? A. What is it exactly? (After examining document) .369, that seems to be the second low bidder.

Q. The decimal point to indicate dollars and cents, and the decimal point means 36 cents in our language; is that right? A. Yes.

Q. And 36, our bid, and the next highest bid .42, is it? A. No. Private Brands bid was 35½ domestic, 36 cents export. The second lowest bid seems to be a mixed bid. In other words, there are two separate prices here on the second low bid. The domestic price established the second low bid, but the export price bid would not be the second low bid. But that would be another company which gave an average bid for domestic [79] and export. That is why it is a little difficult to just pick it out.

Q. The reason I am asking is I was asked by my client on the question of the variance between his and the next highest.

The Court: It is mills.

Mr. Driscoll: That is what I thought she testified.

The Witness: I thought it was a matter of mills.

Q. As a matter of mills rather than cents? A. Oh, yes.

Mr. Driscoll: Thank you very much. I thought you could catch it faster than I could.

That is all.

Mr. Packard: No further questions, your Honor.

(Witness excused.)

Ronald Filera—for Government—Direct

RONALD FILERA, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct examination by Mr. Packard:

Q. Mr. Filera, where are you employed? A. I am employed at present by the Office of the Inspector of Naval Material in Newark, New Jersey.

Q. And how long have you been employed at that particular Inspector's office? A. Just approximately two months, I should say, now.

[80] Q. Prior to that were you employed in a similar capacity in another office? A. Yes, I was.

Q. Where was that office and what was the name of it? A. I was employed at the office of the Inspector, the Assistant Inspector of Naval Material in Newark, New Jersey.

Q. And were you employed in that office in the year 1952 A. Yes, I was.

Q. And your title is as a Government inspector, is it not? A. That is correct.

Q. And in the performance of your duties as such a Government inspector, have you had occasion to do any work at the plant of Private Brands, Inc., at Clifton, New Jersey? A. I did, sir.

Q. Now, we are talking about a particular contract to furnish a supply of USP chloroform, Mr. Filera, and I am going to ask you if you did the inspection and selection of the samples at the Private Brands plant in connection with this particular contract in the early year of 1952? A. Yes.

Q. And whenever you conduct inspections and have anything to do with these contracts with the Medical Agency you maintain a file in which you keep copies of

all papers and documents bearing on the contract? [81] A. That is correct, yes.

Q. And prior to coming to court today I asked you to bring with you certain papers from that file, did I not? A. That is correct.

Q. Do you have those papers with you now? A. Yes, I do.

Q. Now, Mr. Filera, after a contract had been awarded and you were assigned as the inspector in the contract, does the Medical Agency forward to you a copy of the award for the contract? A. Yes, indirectly it comes to my office from the Agency.

Q. And your office gives you a copy? A. That is correct.

Q. Now I have a paper here and ask you to tell me if you can identify it? A. Yes. This would have been the copy that I received from my office—an exact copy of the contract, rather, that I received from my office, and is for chloroform in the amount of 25,824 bottles, and the contract identified by O. I. No. 36603.

Q. And that is with Private Brands, Inc.? A. That is with Private Brands, correct.

Mr. Packard: I am going to offer Mr. Filera's copy of the award in evidence; the Navy is better to us than the Army; they didn't require us to photostat it. We got the original.

[82] The Clerk: Government Exhibit 19.

(Contract referred to is marked Government Exhibit 19 in evidence.)

The Court: Is that the same contract as set forth in Exhibit 5?

Mr. Packard: Yes, sir, it is identical.

The Court: Why do we have a duplicate?

Mr. Packard: I beg your pardon?

The Court: Why do we have to have two?

Mr. Packard: It is not necessary. I was just more or less laying the foundation for the other exhibit to show that the inspector got copies of all documents in the case. It is really immaterial, as far as I am concerned.

The Court: All right.

Q. Now, did this particular contract provide for an inspection at the source, Inspector Filera? A. Yes, it does.

Q. Now, in the case of a contract such as this which provides for an inspection at the source, will you please tell me what your duties were, or after you got the copy of the award itself what would be your next step? A. Well, actually I would wait until the contractor contacted me, because this applies in the case where I have had some business dealings with the contractor previous to the particular [83] contract we happen to be talking about, and if it is a brand new concern I might call them to tell them I am the Inspector involved, and let me know when the material is ready for inspection. In this particular case I believe I waited for Private Brands to notify me when the material was ready for inspection under this particular contract.

Q. And then after they had notified you, Mr. Filera, would you go to the Private Brands plant? A. Yes, sir. Within 48 hours usually we tried to service the plant.

Q. And was it your duty to select certain bottles after the bottles of chloroform had been tagged preparatory for shipment? A. Yes. Well, the actual inspection would consist of a preliminary inspection of the material and an examination of the bottles, let us say, and the cartons that they were packaged in to see that they conform with the specifications, the contract and specifications involved. But then, after accomplishing that, the next step would be to

select samples if they were required. In this particular case they were.

Q. Now, did you get any instructions as to the number of samples to select? A. Yes. The Agency issues a sample instruction form which tells the inspector exactly how to take a sample or how many to pick.

[84] Q. Now I show you this paper and ask you if you can identify it. A. Yes. This is a copy of the laboratory sampling instructions that I received as part of my file, and it tells me to pick samples in the following manner: It says to pick one sample for each 5,500 bottles involved.

Q. Now in view of the case that this contract called for—25,824 bottles—how many bottles would you interpret that as calling for? A. I would say five samples would cover the selection.

Mr. Packard: I am going to offer the sampling instructions in evidence.

The Clerk: Government Exhibit 20.

(Sampling instructions referred to are marked Government Exhibit 20 in evidence.)

Q. Now, were you—I withdraw that.

Mr. Packard: Excuse me a moment, your Honor. I would like to confer with co-counsel.

(Mr. Packard confers with associate.)

Q. Now, before picking out the samples were all the bottles of Private Brands supposed to be packed in cartons? A. Yes.

Q. So that means that 25,824 bottles were packed in cartons? A. That is correct.

Q. And do you recall how many bottles were to be packed [85] in cartons under the specifications of this

contract? A. Yes. I believe it was 24 bottles per carton.

Q. So that that would be slightly over 1,000 cartons? A. Yes.

Q. Now, do you recall the address of Private Brands? A. No, I do not.

Q. Well, I think I can refresh your recollection and say 1 Pleasant Avenue, Clifton, New Jersey. Now, do you recall the floor on which the bottles were packed in the cartons when you made your selections for samples? A. Well, I have no specific recollection of the actual sampling.

Q. Just give us your best recollection. A. I believe it was on the second floor, sir.

Q. And do you recall whether all the cartons, all the thousand or more cartons had been packed before you made the selection of the samples? A. Yes, I believe so, yes.

Q. Now, did you make a selection of the samples yourself, personally? A. Yes.

Q. And would you make a random selection of the samples or did you select the bottles from one carton before— A. No; the samples would be selected at random.

Q. Do you recall how the bottles or cartons were stacked [86] at Private Brands? A. Well, in a general answer, I was there more or less, once in June. I would say the cartons were stacked four or five high and in rows, so that I could get at the actual carton.

Q. When you selected the samples, Mr. Filera, was Mr. Carey present, to your recollection? A. No, I don't believe so.

Q. Was there not any person from Private Brands present? A. Well, there is one name I recall, and that is a fellow named Lou; who I did quite a business with. He had charge of the shipping department, and if I recall correctly, when I went there to sample he would be the man to tell me where the material actually was. In other words, he would take me to it or tell me what part of the floor of the plant it was located at.

Q. So we have you now to the second floor, to the best of your recollection, and you picked the samples at random. Now you have got five bottles, Mr. Filera. What did you do with those five bottles of chloroform? A. At Private Brands it was my practice to take the samples up to the next floor where the officers are located and proceed to complete the sampling. By that I mean I had certain forms to fill out to accompany the samples. Then it was a matter of sealing the actual bottles with a Government [87] seal.

The Court: Just a moment.

We will take an adjournment now until tomorrow at 10:30 o'clock.

Members of the jury, don't discuss this case with anybody, not even among yourselves, until the case is concluded.

(Whereupon the trial was adjourned to February 1, 1955, at 10:30 a. m.)

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[88] Brooklyn, New York.
February 1, 1955.

Appearances:

(As heretofore noted.)

TRIAL CONTINUED

Mr. Packard: May it please the Court, before beginning today I would like to say a word about the subpoena which was served.

The Court: Yes.

Mr. Packard: Now, during the lunch time recess yesterday I telephoned the laboratory at the medical agency and requested all the material in the subpoena. They said

it would be quite difficult but they would do their best, and I have made arrangements so that if there is a mid-morning recess this morning it can be produced in court.

Now, unless I am mistaken, the material should be produced for your Honor's inspection and then your Honor has the option of allowing defense counsel to examine such of the material as you deem wise and [89] expedient.

The Court: Well, I shall ask you, preparatory to my looking at the documents, to classify them into two groups. Then I will determine whether the documents should be availed of by the defendant.

Mr. Packard: Very well, your Honor. Then when the mid-morning recess is called I will immediately telephone the man—it is only a 5-minute walk—so that he will be over directly.

The Court: Very good.

RONALD FILERA, resumed the stand.

Direct examination by Mr. Packard (Continued):

Q. Now, Mr. Filera, as I recall we got to the point where you brought the sample bottles up to the Private Brands office on the third floor and you were putting your green seals on the bottles? A. Yes.

Q. Now, do you have any specimens of those green seals with you today? A. Yes, I do.

Q. Could you pull one out, please? A. (Witness complies.)

Q. Would you please demonstrate to the jury your method of putting the seal on the bottle? [90] A. Of course the seal would be completed before putting it on the bottle, it would be printed. In other words, certain information would be printed on the form first.

Then a seal would have been placed on the bottle in this manner. Of course, I would have to heat it to have an adhesive on it and write across the top in this way.

Q. In that way—in theory anyway—the cap cannot be opened without taking the seal off; is that correct? A. That is correct.

Mr. Packard: Mark this bottle for identification, please.

The Clerk: Exhibit 21 for identification.

(Bottle referred to is marked Government's Exhibit 21 for identification.)

Q. What information do you customarily put on the green seals before the seal is put on the bottle? A. We have room for the date. That would be the date of the actual sampling. Then there is a space for the sample receipt number. That would be a number that I assigned to that particular sampler to tie in with the sample receipt that was typed up to accompany the sample; and then there is room for the lot number. That would be the manufacturer's lot number, contractor's lot number.

Q. Was this put on in your own handwriting on the seal? [91] A. I usually printed it on with a ball pen.

Q. Would you take a look at this bottle with the fragment, fragment of seal on it, and I ask you if you can say that happens to be your handwriting? A. Yes, I would say this is my handwriting.

Mr. Packard: I ask that this be marked for identification, too.

The Clerk: Exhibit 22 for identification.

(Bottle referred to is marked Government's Exhibit 22 for identification.)

Q. Now, those were sent with a copy of the sample receipt prepared by you to the Agency laboratory; is that correct? A. With copies, actual copies accompanying it.

Q. And you kept a copy of the sample receipt yourself, Mr. Filera? A. I did.

Q. Will you identify this, please? A. Yes. This would be one copy—I believe there were seven made up altogether—one of the copies, there is my signature, and it is for sampling accomplished on 2/18/52 for this particular contract we are talking about, 36603, and it covered Lot 2049, which was supposed to represent 25,824 bottles of chloroform.

Five samples were sent to the lab for analysis.

[92] Mr. Packard: I offer it in evidence.

Mr. Driscoll: No objection.

The Clerk: Government's Exhibit 23 in evidence.

(Sample receipt referred to is marked Government's Exhibit 23 in evidence.)

Q. Now, Mr. Filera, this particular group of five samples was rejected, was it not, by the laboratory? A. That is true.

Q. So in due course you were given an opportunity to select five more samples; is that correct? A. That is also correct.

Q. And when you selected those samples you sent them, or they were sent to the laboratory by a new sample receipt; is that correct? A. That is correct.

Q. Now I will ask you to identify this paper, if you will, please?

The Court: These new samples were from the same lot?

The Witness: No, sir.

Q. Could you tell us what lot the new samples were from? A. The new samples were from Lot 2081, which now also is representing 25,824 bottles. Five samples were selected, and I cannot make the date out. It is—well, it is poor [93] copy—it appears to be 3/24/52, and the sample receipt number is 13 R. F.

By the way, the preceding one was 12 R. F., which was another set of selected samples. Each time I selected a sample I would add on the receipt number, and it also bore my signature.

Q. Did the fact that the next sample following the next sample number indicate to you that that was the very next sampling you did at Private Brands? A. Yes, at Private Brands.

Mr. Packard: I offer it in evidence.

Mr. Driscoll: No objection.

The Clerk: Government's Exhibit 24.

(Sample receipt referred to is marked Government's Exhibit 24 in evidence.)

Q. Mr. Filera, were these sample bottles sent in to the laboratory by you, or did you turn them over to the contractor to send them in? A. Well, after the bottles were sealed and the sample receipt forms were made up, three were to accompany the samples and those I saw to myself.

In other words, I saw that three copies were put in an envelope marked so that they were to go with the sample bottles, and then the sample bottles were turned over to the [94] contractor for mailing to the laboratory.

Q. Now, the sample bottles sent in or received by the laboratory were found acceptable, were they not? A. The second lot.

Q. Yes, the second lot, Lot 2081. A. That is correct.

Q. Now, had the Private Brands got the authority to ship out to the depots? A. Well, he can only ship out on the basis of a release that I make out.

Q. And what is the name of that form? A. That would be Inspection and Receiving Report. We call a DD250.

Q. Now, in the interest of saving time, Mr. Filera, I am going to hand you these five forms and ask you just what form those are? A. These are the forms I was talking about. You can call them DD250.

Q. And, Mr. Filera, do those forms cover five shipments of five different portions of Lot No. 2081 to five different depots? A. Yes, they do.

Q. And was a copy of each of those given to Private Brands? [95] A. That is correct.

Q. And did another copy accompany the shipment of each portion to each depot? A. That is true.

Mr. Packard: I will offer them in evidence as one exhibit.

Mr. Driscoll: No objection.

The Court: And how are they to be designated?

Mr. Packard: I am sorry, I don't follow your Honor.

The Court: Well, what are they?

Mr. Packard: These are forms—when the form is issued by the inspector to Private Brands it authorizes shipment of a portion of the lot, 3,600 bottles to Alameda Depot, 6,000 to St. Louis Depot, 2,880 to Atlanta Depot, 12,862 to Schenectady Depot, and 720 bottles to Louisville Depot.

The Court: Those forms all relate to the Lot 2081.

The Witness: Yes, sir.

The Clerk: Government's Exhibit 25.

(Forms referred to are marked as one exhibit, Governments Exhibit 25 in evidence.)

Q. Now, Mr. Filera, there was another lot produced processed by Private Brands, Lot 2105, was there not? A. That is correct.

[96] Q. And you picked samples from that lot and samples were sent to the laboratory accompanied by one of your sample receipts, were they not? A. Yes, sir.

Q. Will you please identify this for us? A. This would be the next following sample receipt, 14RF is the identification, and it is for the same product we have been talking about and it covers Lot 2105.

Five samples were selected and actually it is broken down into a designation of quantities. In other words, five samples actually represent three different breakdowns of a given quantity. The total would be 23,664 bottles, and I see it covers the original contract with two orders additional added to the original contract.

Q. In other words, we are not sampling the original contract, but additional orders that were added on to the contract and the total was 23,000-odd additional bottles? A. That is right.

Q. And what was the date those samples were selected? A. 5/12/52.

Q. And five samples were selected? A. Yes.

Q. And what is the sample receipt number? A. 14RF.

Q. So that was the very next in sequence at Private Brands? A. Yes.

Mr. Packard: I offer that in evidence.

Mr. Driscoll: No objection.

The Clerk: Government's Exhibit 26.

(Sample receipt referred to is marked Government's Exhibit 26 in evidence.)

Q. Now, again, in the interest of saving a little time, Inspector, I have got eleven forms and what is the designation of those forms? A. These, again, are DD250, release forms.

Q. And may I ask you if those are not eleven DD250's covering eleven shipments of Lot 2105 to six different depots? A. Do you actually want me to check that now?

Q. Well, maybe you better—at least count the forms and make sure I have got the right number. A. Yes, sir, there are eleven here and they all cover shipment under Lot 2105 to various depots.

Mr. Packard: I offer that into evidence.

If I may, your Honor, I will read off the depot again and the number of bottles.

6,000 bottles to Louisville; 2,796 bottles to Atlanta; 3,672 bottles to St. Louis; 3,144 bottles to Schenectady; 1,440 bottles to Alameda; 2,328 bottles to U. S. Navy Supply Depot at Mechanicsburg—the [98] first time that comes into the picture; 1488 bottles to Alameda again; again, St. Louis, 1,992 bottles; 4,888 bottles to Louisville; 984 bottles to Atlanta; and another 984 bottles to Schenectady General Depot.

All from Lot 2105.

The Clerk: Government's Exhibit 27.

(Forms referred to are marked Government's Exhibit 27 in evidence.)

The Court: Mr. Packard, in order that the jury and the Court may understand this 2105, is that the lot that was shipped following the exercise by the Government of the option to procure up to 25,000 bottles, which option clause was in the contract between the parties?

Mr. Packard: Yes, your Honor, that represents the bottles shipped out under the exercise of the option.

The Court: Very good.

Mr. Packard: No further questions.

Mr. Driscoll: No cross, your Honor.

The Court? That is all.

(Witness excused.)

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[99] GRACE HAZARD, called as a witness in behalf of the Government, having first been duly sworn, testified as follows:

Direct examination by Mr. Packard:

Q. Where are you employed, Mrs. Hazard? A. Private Brands, Inc.

Q. And in what capacity are you employed at Private Brands? A. Office manager.

Q. And how long have you been employed at Private Brands? A. Since October, 1946.

Q. And how long have you been the office manager? A. Oh, I don't recall at what point I got elevated. I mean, I did all the work at the office myself and then I got a girl and another girl.

Q. And are you in charge of all records maintained at Private Brands? A. That is right.

Q. And that would include records pertaining to the stock inventory and purchases and sales of items? A. That is correct.

Q. Now, Mrs. Hazard, who is the president of Private Brands? A. Francis P. Carey.

Q. And was he the president in 1952? A. Yes.

Grace Hazard—for Government—Direct

Q. And how much of the Private Brands stock does Mr. [100] Carey presently own? A. Practically all at the present time.

Q. And back in 1952 how much did he own? A. None of the preferred and half of the common.

Q. Now, on what floor at 1 Pleasant Avenue is Private Brands' office located? A. Third.

Q. And do the officers include Mr. Carey and who else? A. Susan M. Dickson is vice-president—at present you mean?

Q. Yes, at present. A. Robert A. Ehrlich is treasurer and I am secretary.

Q. And how long have you been secretary? A. Since January, 1954.

Q. And the office of Private Brands, as I understood it, is one big room, is it not? A. Yes.

Q. So Mr. Carey and you and Mrs. Dickson all have your desks in one large room? A. That is right.

Q. And where does the production or processing of the bottling and packaging take place? A. At present?

Q. Yes. A. Some on the third floor; some on the second floor.

Q. And in 1952 where did it take place? A. I think we did not have—I am not sure when we got the [101] second floor. I am not sure whether there was production then there or not.

Q. But it certainly took place on the third floor in 1952? A. Yes, it has always been production.

Q. And the assembly lines, are they in one big room on the third floor? A. Well, some of the operations are partitioned off. Some of them are open—I mean in the open factory.

Q. Now, after a day's work—I withdraw that question. Mrs. Hazard, in 1952 approximately how many people were employed in the production lines at Private Brands? A. I can't say definitely. I know—

Q. Just in round figures, please. A. Oh, I would say 150, but I am not sure.

Q. And were those mainly men or women? A. Chiefly women.

Q. And was the work on the production lines considered to be skilled or unskilled work? A. Unskilled.

Q. And is there a considerable turnover of the girls? A. Yes, there is a great turnover on the night shift in particular.

[102] Q. Now, after a day's work and a certain number of items have been bottled or packaged, as the case may be, are there any reports prepared which are brought in to you? A. Yes, packing and production reports showing the units produced for every item, and the work ticket showing the people who worked on the job, and the hours each one worked, and the line operation report showing the operations that every employee performed.

Q. Is there any report maintained at Private Brands other than the plant work tickets or the line operation sheets which would show the names of the persons who worked on any particular job at any particular time? A. No.

Q. Now, Mrs. Hazard, you were served with a subpoena today, were you not, or returnable today? A. Yes.

Q. And in the subpoena certain records were enumerated, were they not? A. That is right.

Q. And those records covered the period from September 1, 1951 through June 30, 1952, did they not? A. That is right.

Q. Now, included in those records were not the plant work tickets and the line operation reports pertaining to the processing of the chloroform requested? [103] A. They were.

Q. And were you able to produce those records? A. No, they were not in files.

Q. And as a matter of fact, you were asked to produce the same records when you appeared before the grand jury, were you not? A. That is right.

Q. And were you able to produce them at that time? A. No.

Q. Now, are there any plant work tickets and line operation sheets pertaining to items other than chloroform? A. There are.

Q. And the chloroform items are missing, is that correct? A. That is right.

Q. And who has access to those records other than yourself? A. Anybody.

Q. Including Mr. Carey? A. Yes.

Q. Now, were you also subpoenaed to bring today and previously before the grand jury records pertaining to any tests performed on chloroform during that period? A. Yes.

Q. And are you able to produce any such records? A. No, I couldn't find any in the files.

Q. Mrs. Hazard, you make up certain records of your own, do you not, for purposes of estimating the cost of production [104] and so forth? A. Yes.

Q. And included in those records are what is known as summaries of contract labor, are there not? A. That is right.

Q. And you were also subpoenaed to produce those records pertaining to chloroform? A. That is right.

Q. And those were available and identified by you before the grand jury, were they not? A. That is right.

Q. Would you please identify these three sheets? A. This is direct labor distribution for February, 1952, April, 1952, and May, 1952. The report shows every product on which we worked, the units manufactured, the direct labor dollars and the direct labor hours, from which we compute the units per hour or manhour rate or girlhour rate, and the direct labor cost per unit or per thousand units.

Q. This direct labor, that is labor directly applied, is it not—that is on the assembly line itself? A. That is right. It can be a man working on it, too, if it so reports.

Q. And do those three sheets show the cost or the direct labor cost per unit for chloroform processed in each of those months? [105] A. They show—some of the three would show it definitely. If at the end of February we had not completed the units but had some work in process which had not been reported, there might be some labor in there that we reflect in the next month.

Now, I do not know whether that is true or not.

Q. Well, suppose you give us the figure on the February sheet for cost of processing each unit of chloroform, that is, each bottle of chloroform? A. It is 1490 a thousand, or $.0149. It is a little less than a cent and a half apiece.

Q. And one further question: Your recollection was that those were the only three months which show a processing of chloroform during the period mentioned in the subpoena? A. I think that is right.

Q. That is September to June.

The Court: Of what year?

The Witness: 1952.

Mr. Packard: September, 1951 to June of 1952. I would like to offer these in evidence.

Mr. Driscoll: No objection.

The Clerk: Government's Exhibit 28.

(Sheets referred to are marked Government's Exhibit 28 in evidence.)

[106] The Court: I understand, Mrs. Hazard, that the figure that you gave represents just the labor costs, not the material costs?

The Witness: That is true, and no overhead, just labor.

Q. Mrs. Hazard, you also maintained what is called a Current Stock Record which shows the stocks of the various items on hand any particular time? A. That is right.

Q. And I ask you if you can identify this sheet? A. That is our record for chloroform, bulk chloroform.

Q. And what years does it cover? A. 1949, January 7th, is the first receipt, and it runs through 1952. 11/24 seems to be the last delivery on it or withdrawal.

Q. And would that sheet show all chloroform on hand at any particular time during that period? A. Yes. The book record fiscal account may vary from it somewhat.

Q. And is there any breakdown between U. S. P. quality chloroform on hand and technical or commercial chloroform on hand? A. No, we didn't—on the stock record we didn't shown that.

Mr. Packard: I will offer it in evidence.

[107] Mr. Driscoll: No objection.

The Clerk: Government's Exhibit 29.

(Stock record referred to is marked Government's Exhibit 29 in evidence.)

Mr. Packard: May I have your Honor's permission to summarize to the Court and the jury information contained on the stock record?

The Court: Yes. Your adversary may add to it, if he desires to.

Mr. Packard: Ladies and gentlemen, this is the stock record for chloroform. As Mrs. Hazard said, it covers the period 1949 through 1952.

I am summarizing at this point that I am concentrating on.

In 1952 at the beginning of the year there was no chloroform on hand. On February 6th, 27,950 pounds were received and a notation at the top of the stock record indicates that that chloroform was

ordered from E. I. du Pont under purchase order 2108 of Private Brands.

That chloroform was gradually used up until on February 20th there was 1,888 pounds on hand, after which 3,000 pounds more were bought and the indication is that that comes from McKesson & Robbins. That 3,000 [108] pounds was received on March 19th.

The next thing that happened was another 27,950 pounds was received from du Pont on the 5th of May, and that was gradually expended until it was nearly all gone by the end of May.

Q. Mrs. Hazard, you also mentioned stock records pertaining to chloroform but actually reporting the stocks of materials on hand which are needed to process chloroform; is that correct? A. That is correct.

Q. And that would include such things as caps and bottles, would it not? A. Right.

Q. I will show you this sheet and ask you if you can identify it for me? A. Metal cap with tinfoil liner.

Q. And is there anything on that sheet which indicates to you that the caps in question were intended to be used for chloroform? A. Well, the sheet happens to be marked chloroform up here, so it must be.

Q. And is that chloroform—the mark or notation "chloroform," is that in your handwriting? A. No.

Q. I will ask you if you can identify this sheet? A. This is the 12-ounce bottle.

[109] Q. Is that also for chloroform, Mrs. Hazard? A. Also marked for chloroform.

Mr. Packard: I offer the stock records for caps and bottles in evidence.

Mr. Driscoll: No objection.

The Clerk: Government's Exhibit 30.

(Stock records referred to are marked Government's Exhibit 30 in evidence.)

Mr. Packard: May I have your Honor's permission to summarize certain information from the exhibit?

The Court: Yes.

Mr. Packard: Ladies and gentlemen, the stock records for caps show that on January 24th, 27,220 caps with tinfoil liners were received from a company known as Ferdinand Gutman Company.

On March 28th, 28,810 caps were received also from Ferdinand Gutman Company.

The stock records as to bottles show that on February 1st, I believe, 28,000 bottles were received and on April 4th, 23,616 bottles were received. They both came from a company known as O. Berk Company.

Q. Mrs. Hazard, did you also maintain records—I withdraw that question.

When it is desired by Private Brands to make a purchase [110] of say chloroform, they make a purchase by sending out what is known as a purchase order, does it not? A. Ordinarily, sometimes if we are in a rush we telephone on an item, after which we would probably send a form order, written order.

Q. And after the material had been shipped you would receive an invoice or bill, would you not? A. Yes.

Q. And that would be maintained together with your own copy of the purchase order in your files indexed so as you can make payment; is that correct? A. That is right.

Q. Now, are these purchase orders that Private Brands sends out—whether it is an original order or a form order

—were they numbered in numerical sequence? A. They have a number on them, I think.

Q. Well, each one has a number? A. Yes.

Q. Now I am going to show you this little group of papers and ask you if you can identify it for me. A. It shows the purchase of chloroform from du Pont, has our copy of the purchase order on it, the receipt of the material and the bill from du Pont.

Q. And what date does it show the receipt of the material? A. February 6, 1952.

Mr. Packard: I offer these documents in evidence.

[111] Mr. Driscoll: No objection.

(Documents referred to are marked Government's Exhibit 31 in evidence.)

Mr. Packard: May I have your Honor's permission to summarize information on these documents?

The Court: Yes.

Mr. Packard: The copy of the purchase order is No. 2108 of Private Brands, and that is the same number which appeared on the stock record which I showed you. That is the first purchase listed on the stock record. It is addressed to du Pont, attention of Mr. Bliss, and it says 27,950 pounds chloroform technical, 16.2 cents a pound. Delivery: February 4, 1952. And then under it is the number of the contract, which is already in evidence, and it says right here for "Armed services Medical Procurement Agency."

The invoice from du Pont dated February 7, 1952, says 43 drums; 650 pounds each net 27,950 pounds chloroform technical, 16.2 cents a pound.

Q. Will you take a look at the copy of the purchase order, Mrs. Hazard, and the initials at the bottom of the purchase order "F. P. C."

Do you identify those initials? A. Those are Mr. Carey's initials.

[112] Q. The next set of documents, will you identify that for us, please? A. It is a purchase and receipt of chloroform from McKesson & Robbins and their invoice for chloroform.

Q. And what is the quantity of chloroform? A. 3,000 pounds.

Q. And what is the date of the receipt? A. March 19th.

The Court: 1952?

The Witness: 1952.

Mr. Packard: I offer these papers in evidence.

Mr. Driscoll: No objection.

The Clerk: Government's Exhibit 32.

(Documents referred to are marked Government's Exhibit 32 in evidence.)

Mr. Packard: Again, your Honor, may I have permission of summarise?

The Court: Yes.

Mr. Packard: Your Honor, and ladies and gentlemen, the chloroform in the amount of 3,000 pounds which was purchased from McKesson & Robbins is chloroform U. S. P. and the cost is 30 cents a pound.

Q. Another in our parade of documents, Mrs. Hazard. A. Another purchase of chloroform from du Pont, the receipt [113] on May 5th and their invoice for same.

Mr. Packard: And may I have that so that I can offer it in evidence?

Mr Driscoll: No objection.

The Clerk: Government's Exhibit 33.

(Documents referred to are marked Government's Exhibit 33 in evidence.)

Mr. Packard: May I summarize again, your Honor?

The Court: Yes.

Mr. Packard: The quantity of chloroform ordered is 43 drums, 650 pounds each, of chloroform technical, 16 cents a pound, and the invoice showed that the delivery was made of 27,950 pounds of chloroform technical and the date of the invoice is May 5, 1952.

Q. Now, suppose we double up this time, Mrs. Hazard, and will you please identify those documents for us? A. There are two from O. Berk Company showing the purchase of bottles, 12-ounce bottles received, this one February 1st, the invoice from O. Berk, for 195 gross; and this one was received on April 4th, 166⅔ gross.

Q. What is the cost per bottle? A. $4.88 a gross. One is $5.01, and one is $4.88.

Q. So that would come out 3 or 3½ cents a bottle, would it not? A. Yes.

[114] Mr. Packard: I offer the documents as to bottles in evidence collectively as one exhibit.

Mr. Driscoll: No objection.

The Clerk: Government's Exhibit 34.

(Documents referred to are marked Government's Exhibit 34 in evidence.)

Q. I ask you to look at the next pair of documents. A. These are from Ferdinand Gutman. They show the purchase of caps with liners across in tinfoil. January 24, 1952, and it is the invoice of Ferdinand Gutman. And the other was received on March 28th, and that is the invoice of Ferdinand Gutman.

Mr. Packard: I offer the papers relating to the caps in evidence.

Mr. Driscoll: No objection.

The Clerk: Government's Exhibit 35.

(Documents referred to are marked Government's Exhibit 35 in evidence.)

Q. Will you take a look at this next paper and identify it, please? A. It shows the purchase receipts for chloroform from McKesson & Robbins.

Q. What date and the quantity? A. July 15, 1952, 7,050 pounds, has McKesson & Robbins [115] invoice.

Mr. Packard: Will you please mark this for identification, Mr. Scott.

The Clerk: Government's Exhibit 36 for identification.

(Paper referred is marked Government's Exhibit 36 for identification.)

Mr. Packard: On second thought, I think I will offer it in evidence.

Mr. Driscoll: No objection.

The Clerk: Government's Exhibit 36 in evidence.

(Paper heretofore marked for identification is now marked Government's Exhibit 36 in evidence.)

Mr. Packard: May I have your Honor's permission to read portions from this next exhibit?

The Court: Yes.

Mr. Packard: This shows the purchase by Private Brands of chloroform from McKesson & Robbins, the date of McKesson & Robbins' invoice is July 16, 1952, and the invoice contains the following information:

First, chloroform U. S. P. 2 x 600-pound drums, price 30 cents a pound.

Secondly, chloroform technical, 9 x 650-pound drums, 19½ cents a pound is the price.

[116] Q. And I think we are coming to the end of the trail, Mrs. Hazard. If you will identify that paper? A. It is a purchase of chloroform. I don't see a receipt, but it must have been on the case.

Q. Is there an invoice there? A. Yes, the invoice is here from du Pont, the invoice is dated January 10, 1949.

Q. What is the date of the invoice? A. That is what I said.

Q. I am sorry. A. At least I think I did.

Q I mean to say what is the quantity of chloroform. That is what I intended to say. A. 10 drums, 650 pounds each.

Mr. Packard: Will you mark this for identification, please?

The Clerk: Government's Exhibit 37 for identification.

(Paper referred to is marked Government's Exhibit 37 for identification.)

Mr. Packard: May I have a moment to confer with co-counsel, your Honor?

(Mr. Packard confers with associate.)

Mr. Packard: No further questions.

[117] *Cross-examination by Mr. Driscoll:*

Q. Mrs. Hazard, in the course of your direct examination you mentioned that you were subpoenaed to produce certain records by the District Attorney. A. That is right.

Q. And you were unable to find all the records subpoenaed? A. That is right.

Q. Did you know that Mr. Carey was subpoenaed also to produce some records and wasn't it he who spoke to you

about it and he asked you to collate, to get all these records together so that they could be produced by you? A. Mr. Carey was subpoenaed to bring records before I was and I think I did gather together some of the records for him.

Q. And might the explanation be when you were served with your subpoena to bring certain records they weren't in the office files because Mr. Carey had already been subpoenaed for those records and had them to produce them himself on the subpoena? A. That could well be.

Q. Hadn't also the FBI been at the plant in 1953 and requested certain records from you? A. That is true. They had many of our files that you, Mr. Packard, subpoenaed me to bring them. They were in his [118] office or he had photostats of them at the time I was hunting for them.

Q. Mr. Packard had in his office the records that he had ordered you to produce? A. That is right. I did not have the receipt from the FBI, knowing which records they had taken.

Q. So that you looked all through your voluminous records and you found that he was subpoenaing records that the FBI had and had turned over to the District Attorney and you were hunting for them pursuant to an order of the subpoena? A. That is right.

Q. Just one other question. Between February, 1952, and the date of your subpoena how many times were these papers removed from the files for various requests—and I am thinking of the FBI on the point of checking them and giving them to the production department—were these files requested by the subpoena or in the subpoena? A. At one time in the conference room all of our records were dumped in there for use of the FBI.

Q. There was no question of concealing anything from anybody, was there? A. Of course not.

Mr. Driscoll: I am through, your Honor.

The Court: Are you through with the witness?

[119] Mr. Packard: I am, your Honor.

(Witness excused.)

The Court: We will take a recess.

Those papers that you say have been subpoenaed, I saw some books brought in here, and of course now you can go over them and perhaps you can save a lot of time by classifying them and telling Mr. Driscoll what you have. I don't think you need prolong matters beyond what is direct and relevant and material.

Mr. Packard: Yes, your Honor.

(Short recess.)

The Court: Mr. Packard and Mr. Driscoll, have you ironed out your difficulties?

Mr. Packard: My man hasn't come over yet. The medical agency tells me that they have to send one of their men from their legal department along as a mother hen to the records and I had him telephoned to come over and he said he would be over in five minutes when I discussed it with him yesterday and he hasn't showed up yet. So I suggest, if I may respectfully suggest, your Honor, I am sure he will be here by the noon lunchtime recess and we can probably go over it then.

The Court: You can go over it during the lunch period.

[120] Mr. Packard: Yes, sir.

The Court: All right.

Mr. Packard: Walter Bliss.

Walter L. Bliss—for Government—Direct

WALTER L. BLISS, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct examination by Mr. Packard:

Q. Where are you employed, Mr. Bliss? A. Electro chemical Department at du Pont, 350 Fifth Avenue, New York City.

Q. And is that the same department in which Mr. Hendrixson is employed on the technical side of it? A. That is right, except that he operates out of Wilmington.

Q. And you operate out of New York? A. That is right.

Q. And chloroform comes under your wing, does it not? A. That is correct.

Q. And what are your duties, sir? A. I am a senior sales correspondent and I receive and process orders for products manufactured by the Electrochemical Department.

Q. And were you employed in that capacity in the Electrochemical Department in the year 1952? A. Yes.

[121] Q. And I believe you heard the testimony given by Mrs. Hazard from Private Brands a few minutes ago? A. Yes.

Q. And were you the gentleman who processed those orders for du Pont technical which Mrs. Hazard mentioned in her testimony? A. Yes.

Q. Now, Mr. Bliss, you are acquainted, of course, with the routine of your office concerning the transmission of outgoing correspondence? A. Yes.

Q. And using your own correspondence as an example, if you wish, will you describe to the Court and the jury the routine that was followed in the year 1952 for sending a

letter to a customer? A. Well, I dictate my mail into a machine and the disc is sent to the stenographic department, where it is typed and transcribed, and the original letter and copies are returned to my desk for checking and reading.

Along with these copies is a yellow file copy which we keep in our file. That copy is sent to my immediate superior for approval or disapproval, whichever the case may be. If he approves it, it goes to the District Manager for his information and approval, and if it is not approved, why it will come back to me with a note or probably an explanation of why it should not go out or should be changed. In [122] that case, if it is not approved, the original letter and copies are all destroyed.

Now, if they do approve it, they initial it, they put their initial on the letter and return it to me. Then the yellow copy would be put in the file basket and I would then sign the original letter and put it in the outgoing box on my desk. Then it would be picked up by a mail clerk, who made a periodic trip around the office for that mail, and he would run it through the meter mail machine, and of course it is put in the mail bag, the Government mail bag, for mailing.

Q. And it was only in the case when the yellow copy, which is circulated among your superiors, has been approved by them that the original is allowed to go out? A. Yes, that is correct.

Q. And do you know of any deviations from that procedure, to your recollection, sir? A. No. None.

Q. What was the name of your immediate superior and his immediate superior that looked over the yellow copy? A. In 1952, Mr. Wilson Markson—I believe his title was Chief Clerk—and R. H. Dufault was District Manager.

Q. Now, Mr. Bliss, after the first order placed by du Pont for chloroform technical, your invoice dated [123] February 7th, did you have any occasion to write a letter to Private Brands, to Mr. Carey, concerning the fufillment of that order? A. Yes, sir. There was a letter dated March 12th, I believe in 1952, which was in answer to a telephone inquiry by Mr. Carey requesting the results of tests on the chloroform technical which we had shipped to him.

Q. And in that letter did you telephone Mr. Carey the results of the test? A. Yes, I did.

Q. And where was the chloroform shipped from to fill that order? A. It was shipped from our manufacturing plant at Niagara Falls, New York.

Q. And where did you get the information as to the results of the tests which had been made? A. I sent a teletype to the plan requesting that information.

Q. And did you get a teletype back from the plant? A. Yes, they answered my wire by teletype.

Q. And is that the usual course of your business procedure for obtaining information about tests? A. Yes.

Q. And was the information as to the tests incorporated in the letter? A. Yes.

Q. And do you have a copy of the teletype with you? A. Yes.

[124] Q. Now, I show you this yellow copy of a letter, Government's Exhibit No. 18 for identification, and ask you if you can identify that? A. Yes. This is the letter dated March 12, 1952, to Private Brands, for the attention of Mr. Carey, and advising him of the tests, the test results on chloroform technical which we had shipped to him.

Q. And does that letter indicate that there was one lot or more than one lot made up by du Pont in order to fulfill the order? A. In this shipment there were ten lots, ten different lots.

Q. And the total was 27,000-odd pounds? A. That is correct.

The Court: What is the date?

The Witness: The date of the letter, sir?

The Court: Yes.

The Witness: March 12, 1952.

Mr. Packard: I offer the copy of the letter and the teletype in evidence.

Mr. Driscoll: No objection.

The Clerk: The letter is 18 for identification, now in evidence.

(Letter heretofore marked Government's Exhibit 18 for identification is now received in evidence.)

[125] The Clerk: The teletype is Exhibit 38.

(Teletype referred to is marked Government's Exhibit 38 in evidence.)

Mr. Packard: No further questions.

The Court: Any cross-examination?

Mr. Driscoll: No cross-examination.

The Court: That is all. Thank you.

(Witness excused.)

Mr. Packard: Max Feinberg.

MAX FEINBERG, called as a witness on behalf of the Government, having first been duly sworn, testified as follows:

Direct examination by Mr. Packard:

Q. Where are you employed, Mr. Feinberg? A. I am employed in the chemical laboratory of the Armed Services Medical Procurement Agency here at Sand Street in Brooklyn.

Q. And in what capacity are you employed at the laboratory? A. I am the supervisor of the chemical testing section.

Q. And how long have you been employed at the laboratory? A. Approximately seven years.

Q. And in 1952 were you employed in the same capacity? [126] A. Well, I was the assistant supervisor at that time.

Q. Now, Mr. Feinberg, what is your profession? A. Well, I am a pharmacist by education. I was graduated from St. John's College of Pharmacy in 1939. Since then I have been employed as a pharmacist for five years and a chemist practically ten years.

Q. And has your entire period of employment been at the Agency laboratory? A. Well, I was employed in a Navy laboratory for approximately three years prior to this.

Q. And what are your duties in your present position, Mr. Feinberg?

The Court: Mr. Feinberg, I did not get the name of the Agency.

The Witness: Armed Services Medical Procurement Agency.

Q. Will you answer the question? A. Pardon me?

Q. I believe the question was, what are your present duties? What are your duties at the Agency? A. Well, as supervisor of the chemical testing section I receive the samples to be tested and assign them to analysts, confer with them where any trouble may arise, finally reading their reports after the analysis is completed, and then [127] if there are deviations I send them on to the chemical technologist, Mr. Stoll.

Q. If there are no deviations, what happens? A. If there are no deviations I mark the sample receipts, I mark the laboratory report "accept" and send it in to the typist, who in turn types it, the laboratory officer signs it.

Q. In the case of rejection and an unsatisfactory laboratory report—and I am talking particularly about the year 1952—what type of technical review would the laboratory report receive before a final decision was made by the purchasing officer? A. Well, the analysts would report the findings, the supervisor of the chemical testing section would review those findings, confer with the analysts precisely how they tested the material; then possibly have another analyst check the results.

At times the supervisor would witness the testing himself. Then any comments that may be necessary may be put on work sheets. It is then sent to Mr. Stoll, the technologist, who in turn may confer with the Chief of the Materiel Standards Division, who was a physician at that time, or the 10-year officer, or whoever he feels would be necessary to confer with in writing his report.

Q. Now, as assistant supervisor chemist in 1952, you had [128] approximately the same duties as you do, except a little more subordinate position; isn't that correct? A. That is right, sir.

Q. With these bottles a sample is received accompanied by a sample receipt. Is there any provision for tallying in the amount or recording the receipt of the bottles and the receipt? A. Yes, sir.

Q. How is that done? A. Well, samples are routed through the shipping and receiving room, they come up into the laboratory, a clerk there tallies them into a laboratory tallying book, and that book contains a laboratory report number, it contains a stock number, the name of the item, the number of samples that had been received, the sample receipt number which was designated by the inspector at the time that he bottled the samples, the source from which it was obtained, and then after the report is processed it is marked as to acceptance, rejection, expended or not expended.

Max Feinberg—for Government—Direct

Q. Now, Mr. Feinberg, do you in the laboratory keep a file or folder pertaining to each one of these products which you have to pass on the samples? A. Yes.

Q. And at my request you have brought certain documents, have you not? A. That is right, sir.

[129] Mr. Packard: Suppose you just hand them over to me.

(Documents produced by witness.)

Q. Mr. Feinberg, the sample instructions telling the Government inspector how many bottles to pick, those are issued from your laboratory? A. That is right.

Q. And who has the authority or responsibility to designate how many bottles from each lot? A. The chemical technologist, Mr. Stoll.

Q. You keep a copy of the sampling instructions, do you not? A. That is right, sir.

Mr. Packard: We have already got a copy in evidence through Mr. Filera, so I think we will just skip that.

Q. Now, I have got this book and I have opened it at page 320, and I will ask you if on that page it showed the receipt of any samples produced by Private Brands? A. Yes, sir.

Q. And what is the information pertaining to the receipt of the samples? A. This chloroform was received on the 25th of February, 1952. It was assigned a laboratory report, No. 73128. There were five samples.

[130] The sample receipt number was 12. The contract number 36603. The tally-in number was 8744. The contract of Private Brands. The source was Passaic. That is the home of the inspector's office, and then reject expended.

Q. Mr. Feinberg, the tallying-in number 8744, is that number eventually picked up on a laboratory report pertaining to these samples? A. That is right, sir.

Q. And the laboratory report, will that also contain the sample receipt number of the inspector? A. Yes, it will.

Mr. Packard: Again, if your Honor please, we are back to the business with the photostats, and I have here one of our certified and authenticated photostats, which is a reproduction of that particular page. Therefore I offer it in evidence.

Mr. Driscoll: No objection.

The Clerk: Government's Exhibit 39.

(Photostat of page referred to is marked Government's Exhibit 39 in evidence.)

The Court: What is the page, Mr. Feinberg?

The Witness: 320.

Q. Now, Mr. Feinberg, I take it that a laboratory report was made showing the results of the tests on these samples [131] which you have looked at. A. That is right, sir.

Q. And in this particular case what was the nature of the testing applied, to be applied to the contents of the bottles? A. It was the U. S. P. tests as designated in the United States Pharmacopeia, 14th Revision.

Q. And what is the United States Pharmacopeia? A. That is a book—I see it there on that table—that is a book or a publication which is put out every five years by a group of prominent people in the field of pharmacy, medicine and chemistry which is called the United States Pharmacopeia Convention. They incorporate into this text the frequently used and prominently used items which are used medicinally and in chemistry.

The legal backing that this has is Federal Food, Drug and Cosmetic Act which was passed some years ago. It gives the Food and Drug Administration the authority to enforce whatever is stated in this text.

Q. And what revision was in effect in 1952? A. The 14th Revision.

Q. And is that 14th Revision still in effect today? A. Yes, sir.

Q. And have there been any supplements to the 14th [132] Revision which reflect the conditions of chloroform in any respect? A. No, sir; there have been four supplements but none involved chloroform.

Q. And you identify that book as the 14th Revision of the Pharmacopeia? A. Yes, sir.

Mr. Packard: I offer it in evidence.

The Clerk: Government's Exhibit 40.

(Book referred to is marked Government's Exhibit 40 in evidence.)

Q. And that book contains specifications as to chloroform, Mr. Feinberg? A. Yes, it does.

Q. And those specifications essentially consist of a number of different tests which are applied to the item? A. That is right, sir.

Q. And in order for a quantity of chloroform to qualify as U. S. P. chloroform, isn't it a fact that each has to meet each and every one of the specifications set forth for chloroform in that book? A. It does, sir.

Q. Mr. Feinberg, I show you this paper and I ask you if you can identify it for me? A. Yes, I can. This is the laboratory report No. 73128, which is the same as I read here, sample receipt No. 12RF, [133] which was sampled on the 18th of February in 1952 and given tally-in No. 8744. The contractor is Private Brands. The item is U. S. P. chloroform and the lot number is 2049. Quantity

to be shipped, 25,824. Quantity sampled of each lot, five units. It was released on the 29th of February, initialed by Mr. Stoll, signed by Commander Timberlake and by D. Grindell.

Q. Now, what are the results of the tests in detail? A. Shall I discuss it or read it, sir?

Q. Whichever you find most convenient or suitable way to do it, Mr. Feinberg. A. Well, there was—

The Court: You better offer it in evidence if Mr. Feinberg is going to read it.

Mr. Packard: Yes, your Honor. I then offer it in evidence.

Mr. Driscoll: No objection.

The Clerk: Government's Exhibit 41.

(Laboratory report referred to is marked Government's Exhibit 41 in evidence.)

A. (Continuing) There are a number of deviations from the specification requirement for this item. The first is labeling.

The nomenclature of the item and the specification [134] requires that it have a seven-numeral number. The label was marked N and then the seven numerals, which indicated a non-standard number—a terminology which is occasionally used in the military.

Then the description of the material. The U. S. P., this text here, calls for a clear colorless liquid. This material, each of the bottles had white, flaky particles in it that you could readily see through the amber bottle.

The specific gravity of the material did not comply with the U. S. P. requirements. The specific gravity was higher. The requirement is that it be 1.474 to 1.478. This was 1.480 to 1.481.

The readily carbonizable substances did not comply either. The requirement is—well, the readily carbonizable

substances are determined by putting chloroform into a clean glass cylinder with a glass stopper and adding an amount of sulphuric acid of a certain strength, also specified in the U. S. P., and you shake that fifteen minutes, let it set, the material separates into two liquids—the chloroform layer and a sulphuric acid layer.

The U. S. P. requires that the chloroform layer should remain colorless and the acid layer should have no more color than matching fluid-A.

Now, they have a color standard in the United [135] States Pharmacopeia, Matching Fluid-A being the lightest color, going down to J or K or somewhere it gets progressively darker as you go down the alphabet.

While we found on this chloroform a double test done by two different analysts, the chloroform layers were colored and the color of the acid layer was darker than Matching Fluid-A, more likely resembling Matching Fluid-G, which is a darker solution.

Another point of non-compliance is odorous and chlorinated decomposition products. The U. S. P. requires that the liquid is colorless and while hot from kerosene emits but a faint vinous or ether odor.

When further diluted with 10 cc. of water, it remains clear, and is not affected within one minute by the addition of three drops of silver nitrate. This is a test where acid is mixed with the chloroform and the odor from this simply resembles kerosene, which of course is a non-compliance so far as the U. S. P. requirement is concerned.

Also, on dilution, it remained cloudy, and on the condition of silver nitrate the turbidity increased, and it became more cloudy.

Each of these compounds indicate that the material did not meet the U. S. P. requirements for those particular compounds.

[136] Those are the only deviations stated here, which technically means that it met the other requirements, whatever they were.

The Court: And was that true—these deviations that you have just listed were true of each of the five samples?

The Witness: That I couldn't say, sir. There would be at least three of the five, possibly all of the five. The amount that you have to use, one analyst may have found that he used most of the material for one group of tests than was given to another bottle. So I couldn't say definitely.

The Court: Now you are reading from this Exhibit 41 and you summarized these deviations, and are we to understand from what you said that those deviations apply to all or some or what?

The Witness: Well, each of the bottles was not tested for each of these items.

The Court: I see.

The Witness: The five bottles were tested, but I couldn't say that each of the five failed to meet readily carbonizable substances or each of the five failed to meet a particular one.

The Court: Then what you do say is that the tests [137] made of the five samples showed in the aggregate that in one or more bottles there was false labeling or deviation labeling; that in one or more samples there were white, flaky particles; that in one or more samples the specific gravity was higher than it should have been; that in one or more samples the sulphuric acid test did not conform with the Pharmacopeia; that in one or more of these samples there was a kerosene smell which showed that it or they did not meet the test for odor or decomposition?

The Witness: Yes. The first item labeling applies to every bottle because that was visible.

The Court: Yes.

The Witness: Yes, sir, that is correct.

The Court: Have I correctly summed up your testimony with respect to the others?

The Witness: Yes, sir.

The Court: All right.

Q. Well, as I understand it, Mr. Feinberg, the analyst might start off with say the readily carbonizable test and he may use up all of one bottle on that, so he would have to start in on another bottle to proceed to the next test; is that correct? A. Essentially, that is right.

[138] Q. And these bottles were all from one lot? A. That is right, sir.

Q. And in pharmaceutical usage, a lot, if you take a lot, a portion from one lot is supposed to be of uniform quality, is it not, with any other portion? A. That is right, sir.

Q. So in theory, as I understand it, one bottle would be sufficient to give a representative picture of the entire lot, would it not? A. The case of a liquid like chloroform I would say yes.

Q. But by having five bottles you would make sure that you would have enough chloroform to apply the U. S. P. test; is that not correct? A. That is right, sir.

Q. Now, in your opinion, sir, do you consider the sum total of the deviations from U. S. P. specifications a slight or a gross non-compliance

Mr. Driscoll: I object to the form of that question, if your Honor please.

The Court: Please wait

Mr. Driscoll: I am sorry. I have no objection to asking the witness a question and let the witness testify, but while I don't mind his testifying, but as far as this question is concerned he should ask a direct [139] question.

The Court: Yes, I think there is some ground for the objection.

Q. Mr. Feinberg, do the total of the non-compliances as reported in this laboratory report represent a gross deviation from the specifications? A. Yes, it does, sir.

Q. Does the laboratory make any attempts to purport to determine the nature of the contamination for impurities which cause deviation? A. No, we don't, but we simply report the findings in accordance with the requirements in the contract, which in this case is the U. S. P.

Q. In other words, what you want to know is whether it is U. S. P. chloroform or not? A. That is correct.

Q. Mr. Feinberg, after the rejection other samples came into the laboratory, did they not? A. Yes, sir.

Q. And those bore Private Brands lot No. 2081, did they not—well, I will withdraw the question.

The Court: Other samples from a different lot came?

The Witness: That is right, sir.

Q. And I ask you if you can identify that? A. This is lab report No. 74684 received on sample receipt [140] No. 13RF. Sampled on the 24th of March, 1952. The contract number was 36603. Tally-in No. 10442. Contractor, Private Brands. U. S. P. chloroform. Lot No. 2081. The quantity, 25,824 units. Quantity sampled, 5.

The report was rendered on the 29th of March, 1952, initialed by Mr. Stoll and signed by Lieutenant Commander Western. The material was reported as complying with the specifications.

Mr. Packard: I will offer it in evidence.

Mr. Driscoll: No objection.

(Laboratory report referred to is marked Government's Exhibit 42 in evidence.)

Q. In other words, the second five samples conformed? A. (No response.)

Q. Now, Mr. Feinberg, were any of the bottles under the first five samples retained in the lab? A. When was that? Now?

Q. Yes, as of the present time. A. No, sir.

Q. And by any chance have you retained any bottles from the second five samples? A. We have one bottle remained from the second delivery, that is right.

Q. I show you Government's Exhibit 22 for identification and ask you if you can identify that? [141] A. Yes, sir. This is a bottle that was received on this—on that second delivery.

Mr. Packard: I am going to offer this bottle in evidence at this time.

The Witness: I don't recall that lab report number offhand, but it was—

Mr. Packard: 74684.

Mr. Driscoll: No objection.

(Bottle heretofore marked Government's Exhibit 22 for identification is now received in evidence.)

Q. Now, the next paper, can you identify that for me? A. This is a laboratory report on 76613. Sample receipt No. 14RF. Date sample, 12 May 1952. Tally-in No. 12714. Office identification number or contract number 36603-1 and 2. Private Brands, contractor. U. S. P. chloroform. Lot No. 2105, and the total quantity was 23,664 units. Five bottles were received.

The report was rendered on the 17th of May, 1952, and it complied with the specifications. It was initialed by Mr. Stoll and signed by Lieutenant Commander Western.

Mr. Packard: I offer it in evidence.

Mr. Driscoll: No objection.

The Clerk: Government's Exhibit 43.

(Laboratory report referred to is marked Government's [142] Exhibit 43 in evidence.)

Q. Now, as you turn to the Engineering Development Division out in Fort Totten, Mr. Feinberg, how does that fit into the picture here? A. Well, in 1952 the Engineering Development Division, which was physically located at Fort Totten in Bayside, was actually a part of the Agency which we are discussing, and they were a research unit of the Agency.

They would attempt to solve problems, field problems or whatever else may have come up, and requested by the personnel in the Agency.

Q. And did you receive any communication from Fort Totten concerning this lot No. 2081? A. Yes, sir. In fact, we received a communication stating that there were particles in the solution, in the chloroform of Private Brands 2081, and we requested that they send the material in for testing.

Q. And did they send that material directly into the laboratory? A. They did, sir.

Q. And was that accompanied by a copy of covering letter to the Inventory Stock Control Corps?

The Witness: May I see that?

(Letter produced.)

[143] A. Yes, sir, this letter was received with it.

Q. That now went into the laboratory? A. Yes.

Q. And what is the date? A. 19 August 1952.

Mr. Packard: I will offer it in evidence.

Mr. Driscoll: No objection.

The Clerk: Government's Exhibit 44.

(Letter referred to is marked Government's Exhibit 44 in evidence.)

Mr. Packard: May I have your Honor's permission to summarize the letter?

The Court: Yes.

Mr. Packard: This is a carbon copy of a letter dated August 19, 1952.

The original went to the Inventory Stock Control over at the Agency, and I understand they keep tab on the stock of the various supplies over at the depot, and the letter was accompanied by six bottles and those went to the laboratory for analysis.

Subject: Foreign matter in stock No. 1-139-000, chloroform, one pound, U. S. P.

In accordance with such and such regulation we enclose the following items: Nomenclature, chloroform, one pound; control lot No. 2081; manufacturer: Private [144] Brands, Inc., Clifton, New Jersey; source of material: Schenectady General Depot. 12 bottles received and all bottles examined had foreign matter present; other brands satisfactory.

2. The item referred to above has been found to be defective for the following reasons:

a. Foreign particles present in all bottles.

3. Six samples of defective item are being sent to your office.

Q. Now, after the receipt of these bottles, Mr. Feinberg, did the laboratory take an analysis of the contents? A. Yes, it did.

Q. And I show you this paper and ask you if you can identify it for me? A. Yes, sir. This is a laboratory report No. 80604. Project number, that is, the plant project number, A-0009-53. The contractor's name, Private Brands. Item, chloroform. Lot No. 2081. Quantity of each lot, 6 bottles.

Q. And what was the date of the release of this particular report? A. 22 August 1952.

Mr. Packard: I offer it in evidence.

Mr. Driscoll: No objection.

The Clerk: Government's Exhibit 45.

[145] (Laboratory report referred to was marked Government's Exhibit 45 in evidence.)

Q. Now, will you take the report again, Mr. Feinberg, and please tell the Court and the jury the results of that report? A. The appearance—all six bottles contained a significant amount of whitish, flaky, insoluble, solid foreign matter, whereas the requirement is that it be a clear solution. The specific gravity did not comply. It was 1.4801 at 25 degrees Centigrade.

Readily carbonizable substances did not comply. The chloroform layer was yellowish and the acid layer darker than the standard.

Odorous and chlorinated decomposition product did not comply. The hot liquid from the mixing has a kerosene-like odor and was definitely turbid, not clear.

The labeling—all six samples were over-labeled, each container bearing two labels, one on top of the other. The one directly on top—well, the outer visible, let us say, the exposed label was Lot 2081. The label underneath was Lot 2049.

The Court: 2049?

The Witness: 2049, yes, sir.

A. (Continuing) The chemical deviations were essentially the [146] same as the first report on Lot No. 2049.

Q. Mr. Feinberg, was the technician who did the analysis, the basic analysis on that lot, the same technician who did the analysis on the original rejected 2049, or was it a different man? A. If my memory serves me correctly, it was a different man, sir, a different person.

The Court: Mr. Packard, your Exhibit 41, laboratory report, does that cover Lot No. 2049?

Mr. Packard: Yes, your Honor, it does. The very first samples that were submitted.

The Court: All right.

Q. Mr. Feinberg, following the rejection or following the finding reported in that last laboratory report, did the laboratory secure any more samples of Lots either 2081 or 2105? A. Well—

Q. And I show you this paper to help you refresh your memory. A. Yes, it did, Mr. Packard.

Q. And what bottles were obtained and where were they obtained from? A. 24 bottles each of Lot No. 2081 and Lot No. 2105 were requested from the Schenectady General Depot.

Q. And did you get those 48 bottles into the laboratory? [147] A. Yes, we did, sir.

Q. And will you identify those for me, sir, please? A. This is a laboratory report on samples received from the Schenectady General Depot.

Lot Nos. 2081 and 2105 was given the laboratory report No. 85903. Project A-0009-53, and it was tallied in 8389. Contractor, Private Brands, and the item, chloroform.

Mr. Packard: And I offer this report in evidence.

Mr. Driscoll: No objection.

The Clerk: Government's Exhibit 46.

(Laboratory report referred to is marked Government's Exhibit 46 in evidence.)

Q. Now, I will hand you back the report, Mr. Feinberg, and ask you if you will please let us know the results on both Lot 2081 and 2105? A. The appearance—all the units of each lot had some fibers and particles. Six units of Lot 2081 had a large amount of flaky sediment.

The labeling—samples of Lot 2105 were not overlabeled. Samples of Lot 2081 were overlabeled as previ-

ously reported in lab report No. 80604. The under label was Lot No. 2049.

It goes on to say here: "Original samples of Lot [148] 2049 were reported via laboratory report No. 73128 with recommendation to reject."

Specific gravity—three units randomly chosen from each lot did not comply as follows, and for Lot 2081 we had specific gravities of 1.4824, 1.4824 and 1.4825.

On Lot No. 2105 the specific gravities were 1.4827, 1.4826, 1.4824.

Those are all non-compliance with the U. S. P. requirements.

Readily carbonizable substances. The above six units tested in specific gravity all gave, in the sulphuric acid layer, colors darker than Matching Fluid-A; each of these six units also yielded a slightly yellow chloroform layer.

Odorous and chlorinated decomposition products—via U. S. P. test procedure, on both lots, an odor resembling kerosene was produced, and the solution was turbed when 2 ml. of the H2S04 was diluted with 5 ml. of water.

When three drops of silver nitrate were added to the clear filtered solution, a distinct turbidity was produced in each case.

There, too, non-compliance with the U. S. P. requirement.

Then there are additional comments here.

[149] Q. Well, we might as well have them, I guess. A. Lot No. 2049 was originally examined in February, 1952, re Contract OI 36603, and was rejected via lab report No. 73128 with recommendation to reject because of chemical non-compliance.

Lot 2081 was originally examined in March, 1952, re Contract OI 36603, and was reported via laboratory report No. 74684 with recommendation to accept.

Complaint samples, reported August, 1952, re Project A-0009-53 via laboratory report No. 80604, were over-

labeled, the original label bearing Lot 2049 being covered by the overlabel bearing Lot 2081.

Q. Well, Mr. Feinberg, I do not like to interrupt you, but I think the rest of the material is repetitive.

Now, after this report you had some bottles on hand in the laboratory, did you not? A. Yes, we had bottles. Yes, we received some bottles in our normal procurement from the Schenectady Depot, where we received all chemicals for laboratory use.

Q. And did you get a request to analyze those bottles? A. Yes, sir, we did.

Q. And at this point I will hand you another paper and ask you if you can identify that? A. This is an information sample. Captain Berner, or Mr. [150] Berner—I do not recall whether he was in the military at that time—asked that we test the ten bottles of Lot 2081 that we had on hand, as a result of procurement from the Schenectady Depot, and also to test the one bottle which re received on the second delivery, also 2081, which we had accepted at that time.

This is laboratory report 23097 and it was released on the 22nd of October, 1953. Mr. Stoll and Lieutenant Commander Murphy, the laboratory officer.

The Court: We will take a recess until two o'clock.

(Recess to 2:00 p. m.)

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[151] AFTERNOON SESSION

MAX FEINBERG, resumed.

Mr. Packard: Did you retain that laboratory report, Mr. Feinberg, or did you hand it back to us?

The Court: Which one?

The Witness: It was 23097.

Mr. Packard: Well, we will proceed from the copy. Here it is, Mr. Feinberg, so I think I will retain the copy.

Could I have the last three questions, please, Mr. Carey?

(The last three questions and answers were thereupon read by the reporter.)

Mr. Packard: I will offer it in evidence.

Mr. Driscoll: No objection.

The Clerk: Government's Exhibit 47.

(Laboratory report referred to is marked Government's Exhibit 47 in evidence.)

Q. Now, Mr. Feinberg, this involved Lot 2081. Correct? A. That is right, sir.

Q. And it involved a total of 11 bottles, 10 of which I believe you said had been obtained by the laboratory in your regular procurement procedure from the depot. A. That is right, sir.

[152] Q. And how were those numbered in the report? A. They were numbered 1 through 10.

Q. And there is another bottle which you said was left over from the second group of samples submitted, Lot 2081, which was found acceptable on the sampling? A. That is right, sir.

Q. And is that bottle that was left over—how is that identified in the report? A. As A.

Q. And does that A appear on the bottle? A. Yes, sir.

Q. And how was it, Mr. Feinberg, that when these bottles, this bottle which was originally sent in from Private Brands as a sample, how come it wasn't used up in the testing procedure? A. Well, this material is 2081 as received complied with all of the requirements of the U. S. P. Consequently, the unused bottle—and we didn't use five bottles since it was a compliance and since all of the five bottles

were of the same lot number—we put this on a shelf for future consumption by the laboratory in its normal operation.

Q. So this bottle stood on the laboratory shelf and was not tested until the date of this laboratory report, some time in 1953? [153] A. That is correct, sir.

Q. And did this bottle comply or not comply with U. S. P. specifications? A. As reported here, it complied with the requirements.

Q. After sitting all that time on the laboratory shelf was compliance with U. S. P. specifications? A. That is right.

Q. And the ten bottles that had been obtained from the depot, was there compliance or non-compliance on those ten bottles? A. They did not comply with all of the requirements.

Q. And summarizing briefly, can you make a comparison of their failure to comply with the deficiencies found in 2049, the first bottles that were submitted to the laboratory?

The Witness: I wonder if I could have the exhibit for 2049, please?

The Court: That is Exhibit 41.

Mr. Packard: That is right, your Honor.

(Exhibit produced.)

A. Well, on description, the original report on 2049, the first sampling, all five samples contained an appreciable amount of whitish flaky insoluble solid foreign matter.

The report here states that all of the ten bottles [154] contained solid foreign particles or fibers ranging from slight to very slight, negligible to heavy—it varied from bottle to bottle—with an amount of insoluble material present.

The specific gravity reported originally was 1.480 to 1.481. On this report it varies from 1.481 to 1.485, still high in the specific gravity value.

The readily carbonizable substances, originally they all failed. This report on hand here, the readily carbonizable substances, appears to comply.

The odorous and chlorinated decomposition products originally failed, and failed again.

Q. Now, were there any bottles left over—I withdraw that question.

Is there any reference in the report to the overlabeling on this Lot 2081? I suggest the last page, Mr. Feinberg. A. I am sorry. Yes. All bottles numbered 1 through 10 inclusive were overlabeled, with the original underlabel bearing Lot No. 2049.

Q. Now, this bottle, Government's Exhibit No. 21 for identification, can you identify that? Is that bottle No. 10 in the report? A. Yes, sir. The No. 10 here on the bottle on the label does [155] correspond with the No. 10 here in the reports.

Q. And does that bottle show the overlabeling? A. Yes, sir, it does.

Q. And as a matter of fact the 2081, the top label has been peeled off to expose the underlabel, has it not? A. That is right, sir.

Mr. Packard: I would like to offer the bottle in evidence at this time.

The Court: 21 received in evidence.

(Bottle heretofore marked Government's Exhibit 21 for identification is now received in evidence.)

Mr. Packard: May I have your Honor's permission to show the bottle to the jury?

The Court: Yes.

Mr. Packard: Perhaps I could pass it around the jury. Would that be—

The Court: That is what I thought you were going to do.

Max Feinberg—for Government—Direct

Q. Now, Mr. Feinberg, under this next laboratory test the laboratory requisitioned bottles from the depot, did it not? A. That is right, sir.

Q. And there were a total of six bottles from Lot 2081 that were brought in from each depot? A. That is right.

[156] Q. So there is a total of 30 bottles? A. Yes, sir.

Q. Now, I am going to show you these three sheets and ask you if you can identify them for me. A. These are the laboratory tally-in records. The samples that come into the laboratory are tallied into sheets, on sheets such as these, and then when the material is tested and it has gone through the lab, the clerk puts a line through it indicating the date that it was released.

Q. And do those tally-in records show the receipt of the six bottles each of Lot 2081 from the five different depots? A. That is right, it does, sir.

Q. And do each of those show that the contractor was Private Brands? A. Yes, sir.

Q. And what month of the year were those bottles received from the depots? A. All in April, 1954.

Mr. Packard: I offer these tally-in sheets in evidence.

The Clerk: Government's Exhibit 48.

(Tally-in sheets referred to are marked Government's Exhibit 48 in evidence.)

Q. Now, prior to the time of the laboratory analysis of those five groups of six bottles each you prepared a summary [157] did you not, Mr. Feinberg? A. Yes, sir.

Q. Setting forth the results of the other laboratory reports? A. That is right, sir.

Q. And that included six laboratory reports as of the receipt of this last group of bottles? A. That is right, sir.

Q. I ask you if you can identify this sheet? A. Yes, sir. I prepared this.

Q. And that is the summary of the previous six laboratory reports? A. Yes, sir.

Mr. Packard: I offer the summary sheet in evidence.

Mr. Driscoll: I am awfully sorry. Did you say you made this summary yourself from the six other reports?

The Witness: I abstracted.

Mr. Driscoll: You abstracted and formed this summary of six other lab reports that you rendered?

The Witness: That is right, sir.

Mr. Driscoll: No objection.

The Clerk: Government's Exhibit 49.

(Summary referred to is marked Government's Exhibit 49 in evidence.)

[158] Mr. Packard: This summary, if I may say so, your Honor, is for the ultimate convenience of the jury so that they can tell in capsule form the results of the six previous laboratory reports.

The Court: And I will not ask you to read it now.

Q. Mr. Feinberg, was an analysis made of the bottles, the five groups each, which came in in April of 1954? A. Yes, sir. One bottle of each of those deliveries was set aside.

Q. That was done at the request of my office, was it not? A. Yes, sir.

Q. And who was the technician who made up the work sheet and report on those five different bottles? A. A Mr. Berger, one of our analysts.

Q. And did Mr. Berger make this report up under your supervision? A. Yes, sir.

Q. I ask you to identify that, please? A. That is it, sir.

Mr. Packard: I offer it in evidence.
Mr. Driscoll: No objection.
The Clerk: Government's Exhibit 50.

(Work sheet referred to is marked Government's Exhibit 50 in evidence.)

Q. Now, as I understand it, Mr. Feinberg, when these [159] bottles were tallied in, the tally-in number was actually put on the bottles, was it not? A. That is right, sir.

Q. And I would like you to look at Mr. Berger's work sheet again and also this bottle, and ask you if you can tie the bottle in with the report? A. Yes, I can, sir.

Q. That bottle obviously has not been tested yet, but that is one of the bottles which has been, which was locked in and one of the other bottles in that group was tested in Berger's report? A. Yes, sir.

Mr. Packard: Well, I will offer the bottle in evidence, too.

Q. And, Mr. Feinberg, this top was just put on to make sure it would not, that it would be securely sealed—this top was not originally on the bottle? A. That was received that way.

Q. The depot put it on, did it not? A. That is right, sir.

Mr. Driscoll: No objection.
The Clerk: Government's Exhibit 51.

(Bottle referred to is marked Government's Exhibit 51 in evidence.)

Q. Mr. Feinberg, in any previous year did Private Brands [160] have a contract to furnish U. S. P. chloroform to the Armed Services through your Agency? A. Yes, sir.

The Court: Previous to what year?

Mr. Packard: Previous to 1952, your Honor.

Q. And what year was that prior contract? Perhaps if you will take a look at this paper it will refresh your recollection. A. This was in 1949, sir.

Q. And what is that paper I have handed you? A. This is a laboratory report No. N-46285, Private Brands, U. S. P. chloroform, Lot CH 6, involving a quantity of 6300 bottles. Three samples were received. It was released on the 11th of February, 1949. Mr. Stoll, the technical reviewer, signed it, and Lieutenant Commander Timberlake signed it.

Mr. Packard: I offer this report in evidence.

The Court: Now, what has that 1949 contract on the issues involved in this indictment?

Mr. Packard: Well, it is the intention to show a previous rejection, your Honor, under the same specifications, the same requirement, which I respectfully submit would bear on the issue of intent.

The Court: All right.

Mr. Packard: I offer this lab report in evidence.

[161] Mr. Driscoll: No objection.

The Clerk: Government's Exhibit 52.

(Laboratory report referred to is marked Government's Exhibit 52 in evidence.)

Q. And, Mr. Feinberg, what is the recommendation in that laboratory report? A. It recommends reject.

Q. And what were the grounds of the recommended rejections? A. Well, on the description, the material contained particles of solid matter.

The residue on evaporation exceeded the U. S. P. limits.

Readily carbonizable substances failed.

Odorous and chlorinated decomposition products failed to meet the U. S. P. requirements.

And therefore rejection was recommended.

Q. Now, Mr. Feinberg, after this rejection in 1949, Private Brands was given an opportunity to replace the lot and submit new samples, was it not? A. Well, new samples were received by the lab, yes.

Q. And I ask you if you can identify that? A. Yes. This is a laboratory report No. 49113 of Private Brands, U. S. P. chloroform, Lot C H8, for a quantity of [162] 6300 units and 4 units were sampled by the lab.

Q. And the date that the lab report was released? A. It was released on the 13th of May, 1949.

Mr. Packard: And I offer this report in evidence.

Mr. Driscoll: No objection.

The Clerk: Government's Exhibit 53.

(Laboratory report referred to was marked Government's Exhibit 53 in evidence.)

Q. And, Mr. Feinberg, did this report show acceptance or rejection? A. It showed acceptance, sir.

Q. Mr. Feinberg, you have testified, I believe, that you are a pharmacist and a chemist; is that correct? A. Yes, sir.

Q. Now, in your opinion as an expert, sir, can you tell us with any reasonable degree of certainty whether there is a difference between U. S. P. chloroform and technical chloroform as far as medical purposes are concerned? A. Well, technical grade chloroform would not be used medicinally.

The Court: Would not be used what?

The Witness: Would not be used medicinally.

A. (Continuing) Nor would it be used for any U. S. P. test. Any test involving chloroform in the U. S. P. requires that [163] it be the U. S. P. quality.

Chloroform is also used internally in such things as cough medicines, also toothache drops, as a carminative in the expulsion of gas from the stomach. It is used in the form of a chloroform spray which has ingredients used in compounding prescriptions, in addition to the laboratory use which it has.

It is also used as a solvent. There are very many uses of chloroform.

Q. And when would technical chroloform not be specified for medicinal use? A. Well, technical chloroform could contain large amounts of impurities.

The U. S. P. limits such impurities, whereas the technical grade would have no limitation, and therefore you couldn't possibly take the chance of dispensing chloroform of a technical grade where a U. S. P. grade is intended.

Q. And are there laboratory experiments or laboratory uses for which U. S. P. chloroform is suitable and for which technical or commercial chloroform is not suitable? A. Well, not knowing the degree of impurities in a technical grade chloroform, you couldn't undertake to use it for testing because you have no knowledge what the impurities may be, nor to what extent it may be present. So you could [164] very easily get false results or in any way make the results meaningless.

Q. In other words, to insure the accuracy and meaningfulness of the results you have got to have U. S. P. chloroform and nothing else; is that correct, Mr. Feinberg? A. That is right, sir.

The Court: Mr. Feinberg, what is the difference between chloroform U. S. P. and chloroform U. S. P. not to be used for anesthesia?

The Witness: There is no difference puritywise.

The Court: It is the same?

The Witness: Same material.
The Court: Same material?
The Witness: Yes, sir.

Q. Although it is the policy of the Army not to use chloroform for anesthetic purposes because of superior anesthetics, as I understand it, Mr. Feinberg, the Army draws upon stocks of chloroform in depots for the medical purposes and the laboratory purposes you have outlined; is that not correct? A. Yes, sir.

Mr. Packard: No further questions.

[165] *Cross-examination by Mr. Driscoll:*

Q. Mr. Feinberg, do you consider yourself an expert, a chemist? A. Well, I have had ten years of experience as a chemist, sir.

Q. You started off as a pharmacist and graduated from the St. John's University of Pharmacy? A. Yes, sir.

Q. You were a pharmacist for five years? A. Yes, sir.

Q. And thereafter you gave up pharmacy, as it were, and you practiced as a chemist? A. That is right, sir.

Q. And for the past seven years you have been employed by the Federal Government? A. That is right, sir.

Q. Now, you don't have to be an expert chemist to testify as to what you called double relabeling? A. Taking one label off and putting another one on?

Q. That is right. And as part of this laboratory report of summarizing technical defects in chloroform, one of the things on that report was about relabeling. Right? A. One of the points of deviation was relabeling. That is right, sir.

Q. And it was a chemist that made that report. Right? A. It was a chemist that made that report, yes, sir.

[166] Q. What effect, if any, did that have on the chemical contents to make it a rejection as good chloroform? A. Sir, are you saying that if the chloroform—

Q. I am not saying anything, sir. I was just asking you. A. I don't get that question. I am sorry.

Q. In the several lab reports testified to by you and put in evidence my recollection is that in each one of those reports that you testified to were a summary of technical technicians and chemists in the laboratory testing a substance called chloroform which was in bottles, in each one of those rejection reports, you call them, one of the purposes for the rejection was relabeling. A. Overlabeling, sir.

Q. All right, overlabeling. A. Yes, sir, that is right.

Q. And any man or woman of the jury looking at that bottle could tell it was overlabeled. Right? A. Yes, sir.

Q. So you don't have to be a chemist.

Now, incidentally, did you look at those bottles? A. Yes, sir.

Q. You saw the double labeling? A. Yes, sir.

Q. It was obvious, wasn't it? A. Yes, sir.

[167] Q. Obvious—no question about it—that it was not a good job of perfection so that you wouldn't know there were two labels. Right? A. Well—

Q. Well, you could tell the one label was there and another label was put on top? A. I had to look through the window up into the light of the sky to see the lot number underneath. I could tell that there were two labels but not what was underneath.

Q. Because they didn't coincide exactly mostly? A. That is right.

Q. So it was obvious relabeling and that there was not any attempt to deceive and making believe it was the original labeling?

Mr. Packard: I object.

The Court: I sustain the objection to the form of the question.

Q. So that it was obvious, was it not, to any human being with ordinary eyesight looking at it, in practically all the cases like the bottles, when they picked them up, to look at them, if they did, to know that there were two labels on that bottle, one on top of the other?

Mr. Packard: Again, I object to the form of the question, your Honor.

The Court: Overruled.

[168] A. May I answer that you could not readily detect the lot number mark on another label—

Q. I didn't ask you that, sir.

The Court: Well, let him finish his answer.

A. (Continuing) You can detect that one label was placed upon another but not the exact wording on the label unless you specifically looked for it.

Q. I know that very well. All I asked was you could tell there were two labels. There may have been plainer labels, but there were two of them? A. There were two of them.

Q. That was obvious? A. Yes, sir, it was obvious.

Q. Now, on your direct examination, Mr. Feinberg, I believe in reference, in testifying as to Exhibit, Government's Exhibit No. 41, lab report of the test of Lot 249 and so forth— A. 249?

Q. 2049. I am sorry. These numbers are getting a little bit too much for me. Lot 2049. A. Yes, sir.

Q. You said you couldn't say that the ground of rejection of each one of the five samples was the same. Do you remember saying that? If you don't remember, if I am misinterpreting it—that is my recollection of your testimony. [169] A. Well, the Judge elaborated.

Q. I know the Judge asked you questions about the same thing. A. Well, I said that these bottles failed to meet all of the requirements of the U. S. P., and it was indicated that one or more of each bottle failed to meet a test in the U. S. P.

Q. So that in that case five sample bottles were tested? A. That is right.

Q. Could it not have been that say one of the five bottles had no imperfections of any sort? A. I would say that that would be unlikely.

Q. But it could happen? A. When you get down to it, I suppose anything could happen. I couldn't see how, sir.

Q. You also said that there was a gross deviation, or did you use the words "gross deviation"?

> The Court: Well, that was used in answer to the question which I put to the witness, and he explained that in respect to Lot No. 2049 in the laboratory report, which is in evidence as Exhibit 41 relating to Exhibit 39, that these various samples tested showed one or more imperfections or deviations, and all of them together he included under the term "gross deviation."
>
> [170] Is that correct?
>
> The Witness: Yes, sir.
>
> Mr. Driscoll: That is my recollection, your Honor, also, and I would like to know what he means by gross deviation.

Q. Maybe I misunderstood. You mean all the samples that were made in the various tests in the course of the five bottles the gross result was the deviation; is that right? A. No, the extent of impurities.

Q. Yes. A. The large number of tests that it failed, and failed without any doubt, made it a gross extent of deviation.

Q. I see. The sum total of all of them made it gross, is that right? Maybe I do not understand you. I am trying to get the jury to understand it. It didn't seem clear to me.

The Court: You mean that you use the word "gross" as substantial as against something immaterial?

The Witness: That is right.

Q. In toto. This may clear it up. One of the five or six—in other words, in one of the tests if there were a deviation of 2.0 or 2.1 thousandths is what you are referring to when you say gross?

The Court: In respect to which of these classes of [171] deviation?

Mr. Driscoll: In any one of them.

We will drop that.

Q. Now, the lab report that you testified to showing tests of these samples— A. Showing? What was that, sir?

Q. Showing or being the result of summary of tests by technicians under you. A. Yes.

Q. In the laboratory were what type of tests—U. S. P.? A. Yes, sir.

Q. Now, there was put into evidence this bible in the chemistry field called the Pharmacopoeia and so forth—

Mr. Driscoll: If I may read—this is the same book—I would like to read—

Mr. Packard: If your Honor please, I only want to make sure that the proper edition—

Mr. Driscoll: Yes, I will show it to you. I will read this.

Q. Page 133 of the—

The Court: Exhibit 40—you are reading from Exhibit 40.

Mr. Driscoll: Exhibit 40, I believe, the book. That is right?

Mr. Packard: That is right, your Honor.

[172] Q. (Continuing) Exhibit 40, page 133, it says—you correct me if I am wrong—this is the U. S. P., what you have referred to as the U. S. P. test for chloroform. A. That is the U. S. P., yes.

Q. And it sets forth the basis for U. S. P. standards. A. That is right.

Q. Under the heading chloroform? A. That is right.

Q. (Reading) "Chloroform contains not less than 99 per cent and not more than 99.5 per cent of $CHCl_3$, the remainder consisting of alcohol."

Did the chloroform we shipped pass that? A. The chloroform that we received and tested was not tested for the presence of alcohol, because there is no specific test under the purity test for alcohol of the U. S. P. However, it must contain that amount of alcohol.

Q. Now it says: "Specific gravity—The specific gravity of chloroform is not less than 1.474 and not more than 1.478."

And then it goes on: "indicating not less than 99 per cent"—what I just read to you.

Do you say that if the tests showed of this raw material, the material shipped to you by the defendant, if it showed 1.4781, that would be a deviation according to you, [173] under this U. S. P.? A. That would be a deviation, yes, sir.

Q. And would it be rejected on that basis? A. That is something that the medical officer would have to determine or whoever happened to be the head of the Material Standards Division.

Max Feinberg—for Government—Cross

Q. Superior to you in your division? A. Superior to me.

Q. You would pass that on from the analytical chemist who made the test, who reports it, and then you would pass it on to your superior officer? A. I would pass it on to higher echelons.

Q. In your experience in the years in your position have reports of such tests been accepted and used? A. Referring to chloroform, sir?

Q. Yes, sir, I am sticking to chloroform—in this particular part of it, specific gravity. A. In my experience we have not—any deviation in chloroform, as well as I could remember, has been rejected if it did not meet all of the tests of the U. S. P.

Q. Now, isn't it a fact that there is an allowable deviation in this respect whereby you will accept and use material with a bit of a variation, one end or the other? A. That variation is already indicated.

[174] Mr. Packard: I object, your Honor, because we are talking about chloroform.

The Court: He is talking about chloroform.

Mr. Driscoll: Nothing but chloroform.

The Court: I overrule the objection.

Mr. Driscoll: Let that be understood—nothing but chloroform.

A. May I have that question again, please?

Q. Isn't it a fact that there are contracts, materials shipped to the Government, let us say, wherein the deviation, either one end or the other, it would be 1.4 so and so, such as 1/1000 deviation over the top or the bottom figure, is accepted and used by the Government?

The Court: Are you talking about specific gravity?

Mr. Driscoll: Yes, your Honor, I am just on that one point just now—specific gravity 1.478.

A. I do not recall any instance where a material was outside of the limits of the U. S. P. and was accepted by the Government.

Q. Now suppose you had five sample bottles of chloroform, you tested bottle No. 1, let us say, and just for this particular part of the test of U. S. P. call it specific gravity.

The lab test of that one bottle showed as the specific gravity 1.474, the next bottle, sample bottle, [175] showed 1.476, the next three bottles showed 1.478. They would be all accepted, the whole lot? A. Is this all one lot number, sir?

Q. Yes, sir, the five samples that you took from Lot 2049. If the test for specific gravity of each one of the five sample bottles showed those for each one of them. A. Well, sir, that would involve speaking to higher echelon in regard to that, the reason being that with the material is the lot number, the material included is the same, regardless of what bottle you are talking about, which would lead one to suspect that possibly this material, which is under one lot in the Agency, is not one lot number.

At that time it may be additionally considered, or whatever may be done, but that would go to a higher echelon.

Q. All right. You are qualified as an expert chemist. Would the method of storing, and by storing I mean putting a bottle on a shelf, putting it in a packed case with 24 other bottles—would the method of storing have any effect on what you would find when you tested the contents?

The Court: You are assuming that it was fully sealed?

Mr. Driscoll: Fully sealed, yes, your Honor.

Q. In other words, let me put it very simply: Suppose a case of 25 bottles were packed on the floor level and the [176] next case—so packed them but they turned them upside down and they put another one up there and you work

the packing cases from the top, which were upright, when you take a bottle, the inspector so testified, then he went and says take that off here and takes something out of that case, he opens it up and took that botttle, he put that aside, he goes on along and he has five samples.

Now, would the test in bottle No. 2 show the same as the test in bottle No. 1, keeping in mind naturally it is the same lot number, the same batch of the same material? A. I would see no reason why it should not be the same, sir.

Q. So that the method of storing has nothing to do about with reference to the contents? A. That is right, sir.

Q. Now, let me go further and ask you this— A. Of course, sir, you could go to the boiling point of chloroform. It is so hot that you could break a bottle. You are within—

Q. I have not asked you that. You are anticipating. I am just talking of position. A. Within reasonable limits.

Q. I am asking you if those ten cases were in this room, sir, and ten cases were in another room, and the temperature in this room is one thing and the temperature in the other [177] room is another thing, and you took a batch out of that room and checked this room, would the tests result in the same? A. When you say the temperature, are you referring—

Q. Supposing one room was filled with 25 cases of bottles, the temperature were 102; down in that other room the temperature were 72, and you took one bottle out of that room and another bottle out of the other room and you tested them, would the result of the laboratory test show the same? A. My thought is that it should show the same.

Q. It should? A. It should show the same. I couldn't say it would. My opinion is that it should.

Q. Your opinion is valuable. A. Thank you.

Q. You have studied chemistry. Now, suppose out of the same batch—I call it batch, you call it lot number—the stored batch or material, out of it 25,000 bottles were filled, that is the same material, take that for granted, and you

took one sample from a case which had been stored for one month; then you took a sample out of case that had been in storage for eight months and you tested them, laboratory-tested them and they showed different results.

Would that be possible?

The Court: By your question you mean to imply [178] would the duration of storage have an effect on the specific gravity—

Mr. Driscoll: Of the chloroform contents.

A. I still can't see why it should have any difference.

Q. Well, don't you know? A. No. I never have experimented it. I would be guessing if I said that it would not. I said my opinion is that I do not see why it should have any difference.

Q. Well, suppose I refresh your recollection. Maybe my recollection is wrong. Suppose I say that the testimony so far here shows tests, the same lot number or, as I remember it, the same batch, and tests were made of samples one month later after shipment and delivery by the PBI, and the other samples six or eight months, and according to these lab reports it appears to me, from recollection, that the tests were different, the results of the tests showed a difference in the contents under U. S. P. testing formula.

If that were so, would you say then that length of storage and other things might affect—

Mr. Packard: I object to the form of the question and I also believe that counsel is characterizing the evidence to suit his own purposes.

The Court: I will sustain the objection.

Q. Well, you are an expert, Mr. Feinberg.

[179] The Court: We have gone over that.

Q. All right. Your answer then as it stood before was you don't know, but you don't think it would; is that right?

Mr. Packard: I beg your pardon. I am not sure to what question you are referring.

The Court: He means whether length of storage has any effect on the specific gravity and the witness has said that he doesn't know but he doesn't think it would. He made no tests to determine that particularly.

Q. And regardless, Mr. Feinberg, of the question of the 102-degree room and the 72-degree room and you said you did not know but you did not think it would have any effect on it, suppose I were to tell you that the Government had a witness here from du Pont & Company—Mr. Hendrixson as I recollect—and he testified that chloroform is very sensitive to temperature, would you still—

Mr. Packard: I object to the characterization of the testimony.

The Court: Yes, you will have to read question and answer. I am not sure that is the right summary.

Mr. Driscoll: It is my recollection that Mr. Hendrixson on direct examination of Mr. Packard, he was put on, testifying about chloroform and other things and a part of his testimony was—I made a notation of it, [180] I don't write shorthand—that chloroform is sensitive to temperature.

The Court: Well, was the variation stated in the question?

Mr. Driscoll: I don't recollect that, to be frank with you.

The Court: No, I do not think so.

Mr. Driscoll: I don't recollect what variation that was and it certainly was not that which I gave, I gave mine as a broad illustration.

The Court: If you are going to bind Hendrixson to this, even assuming that he said that specific gravity of chloroform is sensitive to changes in temperature, we haven't from his testimony, as far as I recollect, any statement of variation.

Mr. Driscoll: From Mr. Hendrixson, no. He testified he knew nothing about that.

Q. Now, Mr. Feinberg, under U. S. P. testing comparison to U. S. P. of chloroform, is it necessary to use five full bottles to effect the test? A. Five full bottles. In fact, most all of our samples are consumed on all fine deviations, because we exhaustively test the material and thereby we very frequently exhaust from the material that we have received the samples.

Q. Well, doesn't the U. S. P. test say how many, how [181] much of chloroform you use to test for whether or not it is U. S. P., and isn't that amount specified in there? Doesn't it amount to approximately less than one bottle, the contents? A. I imagine it does.

Q. And if you recollect, my recollection is, and I think you yourself testified before the luncheon recess that you referred to one set of five bottles and the reason you do not have as an exhibit here any of the first five is because you used them all, but in the second five I think you have two bottles left.

In other words, in one case you consumed all of the contents of five bottles, and in the second case you only had to use the contents of three.

Is that a different method of test or completeness of test or what? A. It is the same U. S. P. test, sir, except that the second delivery which you are referring to, the second sampling complied, the material complied, and there was no particular material visible in the bottles at all, in

any of them, and since they all had the same lot number, by using whatever we required for testing and found it to comply with the U. S. P. requirements, there was no reason to go any further in using any of the other bottles for testing.

[182] Q. I see. But the U. S. P. says a competent chemist, analytical chemist only needs so much of the chloroform to prove whether it is good or bad, according to their test and the fact that an analytical chemist had to use five times that much.

How do you explain that?

Mr. Packard: I object to the question, your Honor, unless it can be read off from the page.

The Court: Read from the exhibit, this Exhibit 40, the Pharmacopoeia.

Mr. Driscoll: I think it was in reference—

The Court: I am asking you to frame your question by reading from Exhibit 40, of the Pharmacopoeia.

Mr. Driscoll: (Reading) "Specific gravity—The specific gravity of chloroform is not less than 1.474 and not more than 1.478, indicating not less than 99 per cent and not more than 99.5 per cent of $CHCl_3$.

"Non-volatile residue—Evaporate 50 cc. of chloroform in a platinum or porcelain dish on a water bath, and dry at 105° for 1 hour: The weight of the residue does not exceed 1 mg."

Q. So 50 cc. How many cc. in a bottle? A. In a bottle there is approximately 300 cc.

Q. 300? A. About that.

[183] Q. So for that test you only take 50 out of 300 cc. and you have got 250 left; is that right? A. Yes.

Q. That is non-volatile residue.

(Reading) "Acidity—Agitate 10 cc."—that is one-third of a bottle content—"of chloroform with 25 cc. of

recently boiled and cooled water, and allow the liquids to separate completely. The water layer is neutral to litmus paper (acidity), and separate portions of 10 cc. each are not affected by a few drops of silver nitrate (T.S. chloride) or colored blue by the addition of a few drops each of potassium iodide and starch T.S. (free chlorine)."

[184] So for the acidity test you only use one-sixth of the contents of a bottle, 50 cc.—

Mr. Packard: I object to that question.

The Court: He has not finished his question. I have asked him to read from Exhibit 40. Now he is attempting to do that.

Mr. Packard: I beg your Honor's pardon.

Q. Now the test for readily carbonizable substances. "Transfer 40 cc. of chloroform to a glass-stoppered separator, add 5 cc. of sulfuric acid, and shake the mixture vigorously for five minutes. Allow the liquids to separate completely: The chloroform remains colorless and the acid has no more color than Matching Fluid A, Page 745.

"Odorous and Chlorinated Decomposition Products—Dilute 2 cc. of sulfuric acid separated from the chloroform in the test for readily carbonizable substances with 5 cc. of water."

That uses up 2 cc., it seems.

The Court: That is not in your book, is it?

Mr. Driscoll: Yes, sir.

The Court: I mean, what it uses up.

Mr. Driscoll: What is used.

The Court: You just read the paragraph from your book.

[185] Q. (Reading) "Dilute 2 c.c.—"

The Court: Without making a comment.

Max Feinberg—for Government—Cross

Q. (Reading) "Acid and phosgene—Into each of two 50-c.c. glass-stoppered cylinders of colorless glass, having an internal diameter of 20 m.m., place 10 c.c. of water, two drops of phenophthalein T. S., and enough 0.01 N sodium hydroxide to produce, after vigorously shaking, pink tints of equal intensity. Into one of the cylinders measure exactly 20 c.c. of chloroform, and again shake the mixture well. Add 0.01 N addition, until the pink color is reproduced in an intensity equal to that in the cylinder without the chloroform. Not more than 0.20 c.c. of 0.01 N sodium hydroxide is required to produce a pink color which persists for 15 minutes.

"Aldehyde and ketone—Agitate 3 c.c. of chloroform with 10 c.c. of ammonia-free water in a glass-stoppered cylinder for 5 minutes. After the liquids separate, transfer 5 c.c. of the water extract to another glass-stoppered cylinder containing 40 c.c. of ammonia-free water, and add 5 c.c. of alkaline mercuric potassium iodide T.S.: No turbidity or precipitate develops within 1 minute.

"Foreign Odor—Pour 20 c.c. of chloroform, in small portions, upon a piece of clean, odorless filter paper laid flat upon a warmed glass plate, and rock the plate from side to side until the liquid is completely evaporated: No further [186] odor becomes perceptible as the last portions of liquid disappear from the paper, and the paper remains odorless.

"Packaging and Storage—Preserve chloroform in tight, light-resistant containers, preferably at a temperature not above 30°. If cork stoppers are used, they should be covered with tinfoil or other suitable material."

Now, Mr. Feinberg, I won't attempt to add up the c.c.'s there, but it doesn't total, as I recollect, 300, which is the contents, c.c. contents, of one bottle, so that to make that test, those five or six different tests for chloroform, all that would be necessary for a man to know, for a chemist, qualified chemist, in analyzing chloroform to use no more than the contents of less than one bottle; is that right?

Mr. Packard: I object to the form of the question, your Honor.

The Court: Well, if the witness can answer it, he may.

A. You do not need more than 300 c.c. to test for USP product.

Mr. Driscoll: That is all I want to know.

The Witness: I wonder if I could qualify that—providing they all meet the specifications of the USP. Otherwise you would have to go into more extensive tests.

The Court: We are assuming that is the condition of [187] the question.

The Witness: I see. Thank you, sir.

Q. Now, this relabeling deviation—

The Court: Haven't you covered that subject?

Mr. Driscoll: I asked him before. I want to come back to it. The reports all show that deviation, double labeling is what they call it, two labels, one on top of the other—that that reference was in all of the reports and I asked Mr. Feinberg if you needed a chemist.

The Court: Yes. Why repeat?

Mr. Driscoll: I am not going to repeat. I want to ask him.

Q. Is there anything in the specifications prohibiting this double labeling? A. A good pharmaceutical practice prohibits that, sir.

Q. Is that U. M. 186 that has been referred to—does that say anything about forbidding one label on top of another? A. I say, sir, that pharmaceutical practice considers that to be poor, because should one label come of

you would have other information on another label, in this case the lot number being different.

Q. But that is not done through contents? A. If one wanted to check back to find out what the testing was on a certain lot number and by chance he saw the under-label [188] rather than the over-label, or vice versa, he could very easily get the wrong information.

Q. But that would have nothing to do with the contents, would it?

The Court: It might.

Q. It would be used for convenience of checking, whether you check 2409 or check 2081.

Mr. Packard: I object to the form of the question.

The Court: I sustain the objection.

Q. There is no prohibition but you say it is just a question of pharmaceutical practice and in the trade it is not good business practice or pharmaceutical practice?

The Court: The charge in the indictment is something quite other than that.

Mr. Driscoll: In the indictment, but there has nothing been said—

The Court: The evidence of overlabeling bears on the indictment, on an issue involved in the indictment.

Mr. Driscoll: Depending upon its purpose. That is why I wanted to find out if there is anything particularly wrong about over-labeling, and there is no prohibition in U. M. 186.

Just one more question.

Q. Mr. Feinberg, what is the purpose of putting alcohol [189] in chloroform? A. Chloroform—the nature of chloro-

form is such that it may oxidize, form benzine, which is a vinous, because alcohol is added, so that if there is any oxidation the alcohol would oxide, form a certain inert material, thereby preventing benzine from forming.

Q. Isn't it added as a stabilizer to reduce the sensitiving or sensitiveness of chloroform to air and temperature and light? A. Well, when you say sensitiveness, I say that it prevents oxidation. If that sensitiveness is going to cause oxidation, alcohol is there to prevent benzine from forming.

Q. To counteract temperature that might extend to chloroform and cause, shall we call it, deviation from what it ought to be? A. I do not know about temperature. The cc. may be one of the factors, but I do not know about temperature.

Q. You do not know about temperature. If I were to say it is for the purpose of temperature, you wouldn't say that was wrong? A. I don't know.

Mr. Driscoll: That is all, your Honor. I am finished with this witness.

Mr. Packard: I have one or two questions, your [190] Honor.

Redirect examination by Mr. Packard:

Q. Mr. Feinberg, are you certified by the United States Civil Service as a chemist? A. Yes, sir.

Q. I want to read two lines from Page 133 of the Pharmacopeia:

"Solubility—Chloroform dissolves in 210 volumes of water. It is miscible with alcohol, ether, benzene, petroleum benzin, and with fixed and volatile oils."

Is there anything in that particular specification which designates either a maximum or a minimum quantity of chloroform to be used in the test? A. No. That gives the exact figures.

Q. In technical chloroform, manufactured as it is without any alcohol and containing certain impurities, in the actual process of manufacture do you know of any way, after being manufactured, bottled and closed with a proper cap, for alcohol to spontaneously degenerate—for the impurities in the technical chloroform to spontaneously disappear? A. No, sir.

Mr. Packard: No further questions.
Mr. Driscoll: Just one question.

[191] *Recross-examination by Mr. Driscoll:*

Q. Now, Mr. Feinberg, just one or two questions. This solubility, did you ever perform that test that Mr. Packard just asked you about? A. Did I ever perform that test?

Q. Yes. A. Speaking to me as having performed the test or the laboratory?

Q. Just you, Mr. Feinberg. A. I have performed parts of that test from time to time.

Q. That solubility test? A. Yes.

Q. You have done it? A. I have performed parts of it. I do not recall specifically performing every compound there, but just mixed it with volatile oil, I have mixed it with alcohol.

Q. On contract samples? A. I have not.

Q. You have not tested any of this PBI contract sample? A. No. I have been a supervisor on there.

Q. But you have not tested it and you were told by somebody who did make the test? A. In many respects witnessed it.

Q. You watched them do it? A. In many respects.

Q. And will you tell me what are the relative percentage impurities in technical chloroform and USP chloroform?

The Court: What was the question?
[192] (Question read by the reporter.)

Mr. Packard: I object to the form of the question unless it is related to the technical chloroform of a particular manufacturer, in the light of such specifications.

The Court: The witness in his answer can state such conditions to enable him to answer the question, if he can answer.

A. The USP indicates the maximum degree of impurities permitted in these tests. It cannot exceed certain maximum impurities. If it does, it fails.

The technical grade chloroform, the specifications vary from one company to another, to the point where I could not possibly tell you what impurities may be present in any one technical grade chroloform. To my knowledge, there is no set specification or no prepared specification which universally takes in technical grade chloroform.

Q. Well, if I bought technical chloroform from XYZ Corporation and it is labeled technical, it might pass the USP test, wouldn't it?

The Court: Well, Mr. Driscoll, the witness has just told you he would have to know if it was from the X Laboratory or the Y Laboratory or the Z Laboratory.

Q. All right, the du Pont Company. If I bought technical, [193] what they call technical chloroform from du Pont, actually test it in your laboratory and it would pass as a USP test, is that so? A. I don't know what the specifications are for technical grade chloroform of du Pont I don't know, so I cannot answer that.

Q. I said, if I bought from du Pont what you call technical, it was not USP, and I want to ask you as an expert and a chemist, if I bought technical chloroform from du Pont Company or from Merck & Company, well-known

chemists, and you tested it, isn't it a fact it might pass USP tests? Isn't that so? A. May I make this observation sir: I do not know of any technical grade chloroform where they had alcohol as a prescriptive.

Q. Is that your answer as to whether or not it would pass a USP test?

The Court: He says he has got to know the specifications of the laboratory which manufactures the chloroform.

Q. Aren't you familiar with products of du Pont and do you know— A. I don't remember ever buying technical grade chloroform. I am not familiar with it.

[194] Q. You never tested in your laboratories or those under you a product from du Pont or Merck? Is that what you are telling me? A. Called technical grade uniform.

Mr. Packard: I object, your Honor.
Mr. Driscoll: No further questions.
The Court: Do you object to that?
Mr. Packard: No, your Honor.
May I ask one question.

By Mr. Packard:

Q. I show you Government Exhibit 38 in evidence, the letter dated March 12, 1952, from du Pont to Private Brands, setting forth certain results of tests on chloroform. Will you look at the stabilizer quantitatively. Is the stabilizer there less than the quantity of the stabilizer in USP chloroform? A. Yes, sir.

Q. And is it substantially less quantitatively? A. Yes, sir.

Q. As a matter of fact, it is only a fraction of the quantity of the stabilizer required in the USP? A. That is right, sir.

Q. And is the specific gravity reported to be higher than the specific gravity required in the USP chloroform? A. It is higher, sir.

[195] Mr. Packard: No further questions, your Honor.

Mr. Driscoll: May I beg your indulgence and ask one more question of this witness?

The Court: Yes.

By Mr. Driscoll:

Q. Mr. Feinberg, does a higher specific gravity indicate a lower or higher manner of $CHCl_3$? A. Is this pure $CHCl_3$, or is there something added to it?

Q. I just said $CHCl_3$. I presume that means pure. A. A higher specific gravity of $CHCl_3$ would indicate a higher percentage of $CHCl_3$ of USP chloroform, providing there is no material added which has a higher specific gravity than chloroform. That in itself would bring up the value.

Mr. Driscoll: That is all.

Mr. Packard: No further questions.

(Witness excused.)

The Court: We will take an adjournment until tomorrow morning at 10:30; and don't discuss the case. I keep giving you this observation. It is part of my duty to do it. I know you won't discuss it, not even among yourselves.

(The trial was thereupon adjourned to February 2, 1955, at 10:30 a.m.)

Colloquy

[196] Brooklyn, New York,
February 2, 1955.

Appearances: (As heretofore noted.)

TRIAL CONTINUED

The Court: Mr. Packard.

Mr. Packard: If your Honor please, you will recall that yesterday Mr. Driscoll and I discussed certain stipulated facts.

The Court: Yes.

Mr. Packard: Facts to be stipulated. I desire at this time to inform the Court and the jury as to the stipulated facts.

The Court: Very good.

Mr. Packard: Pursuant to agreement between counsel for the Government and counsel for the defendant, the following facts are now stipulated—that is, the facts are conceded without the necessity of the Government offering any formal proof—and the stipulated facts are these:

[197] That during the month of April 1952 there was shipped from Private Brands plant in Clifton, New Jersey, to five different Army depots located in different parts of the country 25,824 bottles, more or less, of chloroform and the visible label on those bottles bore Private Brand Lot number 2081, the names of the depots and the number of bottles that went to each depot. The numbers set forth in the authority to ship those are the DD Forms 250, which Mr. Filera identified, and Government's Exhibit No. 25 shows the number of bottles bearing on the visible label Lot No. 2081 that went to each of the five depots.

Five invoices, one for the portion of the shipment to each depot, were submitted in April 1952 by Mr. Carey to the Agency, and on each of these invoices said chloroform USP, so many bottles to such-and-such depot, "I hereby certify that the foregoing bill is just and correct and

payment therefor has not been received." Signed by Mr. Carey, the defendant, and payment was duly made by the Agency or Fiscal Division against each one of those invoices.

Now with respect to Lot No. 2105, it is further stipulated that 11 shipments for a total number of bottles of 23,616, more or less, bearing on the label Lot [198] No. 2105 of Private Brands were shipped to six different depots and the names of the depots and the number of bottles shipped to each depot is stated on the DD Forms 250, which were identified as Government's Exhibit No. 27.

Again, invoices for this lot were submitted by Mr. Carey to the Agency for payment and payment was made against eleven invoices submitted.

The total payment covering the two lots were approximately $17,500, none of which has been refunded to the Agency.

The originals of the invoices submitted by Mr. Carey to the Agency—and that means a total of 16, 5 for 2081 and 11 for 2105—in accordance with the usual procedures were forwarded with the accompanying vouchers, and those are simply the internal devices for authorizing payment through the General Accounting Office.

Authenticated copies have been subpoenaed from the General Accounting Office and I have them in my hands now. The total amount of money paid over under the contract can be ascertained by adding the figures on the vouchers which are annexed to the invoices. I won't attempt to do that at this moment, but I offer in evidence the authenticated invoices and vouchers.

[199] Mr. Driscoll: No objection.

The Clerk: Government Exhibit 54.

(Authenticated invoices and vouchers referred to are marked Government's Exhibit 54 in evidence.)

Mr. Packard: If your Honor pleases, those are the facts that have been stipulated to.

Commander Sullivan.

Raymond R. Sullivan—for Government—Direct

RAYMOND R. SULLIVAN, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct examination by Mr. Packard:

Q. Where are you presently stationed, Commander? A. I am presently stationed at the Armed Services Medical Procurement Agency located at Sands Street here in Brooklyn.

Q. And in what capacity are you stationed at the agency? A. I am Assistant Chief of the Industrial Mobilization Division.

Q. Briefly, what are your duties in that capacity? A. The duties in that capacity, very briefly, would be planning with industry that we will be prepared to have medical items available for military uses and consumption, if and when we are faced with mobilization.

Q. And, Commander, how long have you been attached to the [200] Agency in that capacity? A. I have been attached in that capacity since the 1st of August of 1954.

Q. Now, in connection with this contract 36603 which the Agency had with Private Brands, and in particular with Lot No. 2081, you went on a special assignment at our request, did you not, Commander? A. I did.

Q. And would you please tell us, in your own words, what your instructions were in connection with that special assignment? A. I was instructed to visit five Army depots, namely—for the purpose of refreshing my mind and having it definite in the record, I would like to call the names from this paper.

Q. Very well, Commander. A. The Schenectady General Depot in Schenectady, New York; the Louisville Medical Depot, Louisville, Kentucky; the Atlanta General Depot, Atlanta, Georgia; the Alameda Medical Depot, Alameda, California; the St. Louis Medical Depot, St. Louis, Mis-

souri. These five activities were visited by me in the latter part of August and running over into the first part of September.

The Court: What year?

The Witness: 1954.

[201] A. (Continuing) My instructions were to observe two things—one, were the bottles contained in this Lot 2081 over-labeled; two, and if they were so over-labeled, what was on the under-label.

Shall I just proceed with my story, as I see it?

Q. Yes. Suppose you take us to the first depot and tell us. I would like the record to show how many bottles were received and how many were on hand and how many bottles you examined personally. A. Yes. On the 23rd and 24th of August 1954 I inspected 10 per cent of the bottles that were on hand at the Schenectady General Depot. There were 12,000—no, there were 10,726 bottles on hand. Of that amount I selected at random from the stock in the storehouse 46 cases. Forty-five of the cases contained 24 bottles. One case contained 23 bottles. Which made a total of 1103 bottles which I personally inspected.

My procedure was upon taking the bottle, each and every bottle from the case, which was opened in my presence, of placing—after I had observed whether or not there was an over-label—I then held the bottle with the label away from me before a 100-watt light to observe what was on the other under-label.

I then placed my initials on each and every bottle and numbered the case which these bottles were contained in [202] and were placed aside under special care.

Of the 1103 bottles that I examined at the Schenectady General Depot I found that 1103 bottles, or a total of 100 per cent of the bottles inspected, were over-labeled. Each

and every bottle inspected, as well as being over-labeled, contained on the under-label the Stock Number 2049.

This same procedure I carried on—oh, I might state in regards there photographs were taken of the items that were inspected and of the total lot that was inspected.

Leaving Schenectady, I went on to Louisville. At Louisville there were 2720 bottles on hand. I inspected three cases or 72 bottles and found that the 72 bottles were over-labeled and that the under-label contained the old stock number, 2049.

Going on to Atlanta, the number of bottles on hand was 2658. The number of cases inspected was 12. The number of bottles 288. 288 bottles were overlabeled and 288 bottles contained the old Stock Number 2049 or the lot Stock No. 2049.

At Alameda, the number of bottles on hand was 3360. The number of cases inspected, 15. The number of bottles inspected, 360. The number of bottles over-labeled, 360. Tne number of bottles containing lot Stock Number 2049, 360.

At the St. Louis Medical Depot, the number of bottles on hand, 5,105. The number of cases inspected, 24. One [203] case contained 23 bottles. Twenty-three cases contained 24 bottles, which made a total of 575 bottles inspected. The number of bottles over-labeled, 575. The number of bottles over-labeled and containing—on the underlabel containing the stock number 2049—575.

This concluded the inspection that I was instructed to carry out of checking the over-labeling and the under-labeling.

Q. Now, Commander, you said that in your presence at each depot you had certain photographs taken of the bottles. A. I did.

Q. And did those photographs include close-up views of certain of the bottles at each depot? A. They did.

Q. And in the case of those close-up photographs did you have some of the labels peeled off so that the under-labels on the bottles would be exposed? A. I did.

Q. Now would you please take a look at this photo and tell us what it appears to represent? A. This is a photograph taken in my presence at the St. Louis Depot, Medical Depot, and it shows the picture of five bottles of chloroform that was inspected. It will distinctly show the over-labeling and will show on two bottles that the Lot Number [204] 2081 and the Lot Number 2049 shows.

Mr. Packard: I offer this photograph in evidence.

Mr. Driscoll: No objection.

The Clerk: Government Exhibit 55.

(Photograph referred to is marked Government's Exhibit 55 in evidence.)

Q. Commander, did you have similar photographs made at the other four depots similar to this photograph? A. Yes.

Q. To show the under-labeling? A. At one other depot the under-labeling, but at all the depots the total number of cases and things inspected.

Mr. Packard: May I have your Honor's permission to pass this photograph among the jury?

The Court: Yes.

(Photograph passed among jurors.)

Q. Commander, in the course of your examination of the contents of the bottles to observe the under-label, did you notice anything in particular about the contents? A. Yes, I did. While I was not instructed to observe anything other than the two items in reference before, I couldn't help when in holding this light, holding this bottle up before a

strong light, observing that particles appearing from large to small or small to large—whichever you want to term it—[205] were floating in the bottle. At first, I thought I was seeing spots before my eyes from looking in the light, but, however, after observing it further, I began to notice more definitely that the spots were floating in the bottles.

Q. And you had no instructions to look for particles beforehand? A. None whatsoever.

Q. Had you any indication that there might be particles in the bottles? A. None.

Q. And did you find particles in some of the bottles at all of the depots? A. Yes, sir.

Q. Can you give an estimate or approximation as to the minimum number of bottles that you noticed, these that you happened to notice the particles in? A. Well, in that particular instance, not having been instructed as to anything other than the over-labeling and the under-labeling, and particularly on the basis of inspecting the general 10 per cent of all the stock at the activity, I would very definitely state that I feel that 10 per cent or more of the bottles are.

Mr. Driscoll: I object.
The Court: I sustain the objection.
Mr. Packard: Well, I withdraw the question.
[206] No further questions.
May I ask one more question, your Honor?
The Court: Yes.

By Mr. Packard:

Q. Commander, were you able to see the Lot Number 2049 on the under-label without the aid of looking, holding it up to a 100-watt light? A. I tried on several occasions to see it without the light, and I could not do it and be sure and certain that there was a number there. So I resorted to the candling of the bottles.

Raymond R. Sullivan—for Government—Cross

Cross-examination by Mr. Driscoll:

Q. Now, Commander, I understand your sole direction or directing from the Government was to go to these places that you went, these depots, for the sole purpose of inspecting bottles solely as to the question of what you call overlapping; is that right? A. Over-labeling.

Q. Over-labeling—I am sorry—is what I meant, and as I recall your direct testimony you went to five different depots? A. Yes, sir.

Q. You looked at with your eyes so many bottles in each place and every bottle you looked at or tested for this [207] over-labeling, you found over-labeling? A. Yes, sir.

Q. Did you have any difficulty in seeing that? Wasn't it obvious that they have over-labeling? A. I would not say it was too obvious.

Q. It wasn't too obvious. If I had done the same thing wouldn't I have seen there were two labels on it? A. In lots of cases you would have to look awfully close to observe whether or not there was a label underneath.

Q. What do you mean by awfully close? You mean a magnifying glass, or just— A. Just a close observation. There was a certain thickness to the label, which of course made the first label stand away—

Q. That is right, just like an ordinary human being.

The Court: Don't interrupt.

Q. All right, Commander, would you finish your answer? A. And in my observation I had to look very closely, and I would say in the greater number of cases of bottle examination to see and observe and be sure that I could get on the stand and swear that there was an over-labeling.

Q. You did that the first time you looked at them, knowing that you were going to get on the stand; is that the idea? A. When you are sent to make an inspection such as

I was, I was expected at some time or other to have to obtain the [208] information that I was obtaining in the field.

Q. At that time— A. When I am given the responsibility such as this, I carry it out to the best of my ability, and to make sure—

Q. I haven't any doubt. Do not misunderstand me.

The Court: Go ahead, Commander.

A. (Continuing) I carry it out to make sure and certain, no matter if it was a trial case, of reporting back to my senior or to the United States Army, who requested and instructed me to get this information—I wanted him to have the proper results from the field.

Q. Are you finished, Commander? A. Yes.

Q. Let me say right here and now, I am not impeaching or impugning your enthusiasm or your anxiety for a good job. All I wanted to know was—I will put it this way: You said you did this in 1954, as I recollect, this inspection, and you were sent down there for one purpose by the Government, to find in the depots bottles shipped or sold to the Government by Private Brands, Inc.: is, that right? A. That is right.

The Court: He explained his purpose and his instructions were twofold.

Q. Now, just there—that naturally, if there were two [209] labels on it is obviously thicker than one label, and that is obvious, is it not? A. It is obvious, but it could also be thick, that the printing of the label could be more thicker if it was not a print. I am not questioning the thickness of either label. I am just saying that two labels would be thicker than one, but when there was an over-labeling job on a greater number of these bottles, that it could have been passed as one label.

Q. Would you mind repeating that? A. I said it had to be examined so closely, that it had to be examined closely to make sure there were two labels instead of one. In other words, you just couldn't look at it and say that there were two labels. It had to be closely checked and inspected.

Q. Now, as a matter of fact, the reason for your very close inspection is to find out what was written on the under-label; isn't that so? A. No. I had two definite assignments—one to see whether or not there was an over-labeling, and the other to see what was on the under-label, if it was so over-labeled. I think I stated that before.

Q. And close inspection would be necessary to see, hold it up to the glass, to the window and the sun or light, to be able to read what was written on the label underneath the upper [210] label? A. That is right, you needed additional light.

Q. Now, on that label did it indicate when the contents of the bottle was manufactured and bottled and shipped? A. No, not manufactured and shipped, no.

Q. Did it have anything on it whereby you would know when the contents were put in that bottle and shipped, the date, nothing on it to indicate that to you? A. Nothing that I could see.

Q. Do you know from any other information when the contents were put in those bottles and shipped to the Government? A. That was not part of my instruction.

Q. I didn't ask you that. I asked you did you— A. No, I didn't notice.

Q. Nobody told you when you got this assignment that you were going down to check off over-labeling of bottles of chloroform which were shipped two years prior? A. No.

Q. Now, Commander, you also testified that you did a little bit more than you were designated to do. You looked at the contents, is that right? A. I did.

Q. You weren't told to do that? A. I was not instructed to do that.

[211] Q. Were you just curious when you picked up the bottle and you found what you say are particles? A. That is right, floating particles as I held the bottle. I handled each and every bottle and as I held it before the light I could see these particles floating.

Q. Would you say that that was so in every bottle you looked at? A. I would not say. I would not make that statement. I estimated 10 per cent before because I was working on a 10 per cent basis.

Mr. Driscoll: Could I have Government Exhibit 55.

(Government Exhibit 55 is handed to Mr. Driscoll.)

Q. Now, Commander, you went to the depot and you took out bottles. Did you have to break a case to pick out bottles that you saw to test or inspect as to over-labeling? A. Let me say, we opened the cases rather than breaking them. We opened the cases and they were opened in my presence. I personally took the bottles out and inspected them and the cases were again resealed in my presence.

Q. Was there any notation on the cases as to when they were packed? A. They had a date on the case, yes.

Q. Did you notice that? A. Yes, I noticed the date.

Q. What was the date? [212] A. Without referring to some notes that I have in my book, I couldn't state the exact date.

Q. Refer to your book. A. In my coat back there. That is the notebook that I made my notes while traveling.

Q. Do you want your coat? A. No, it is a little loose-leaf notebook there.

(Notebook produced.)

The Witness: Now, may I have your question again, sir?

Q. What was the date? A. I have here the information—this is at the Schenectady Depot—date packed 2/52.

Q. Indicating, I presume, February 1952? A. I presume that.

Q. So that when you inspected these bottles they had been delivered two years prior? A. I would not know that. All I know that those cases were in my presence and this was on the case that was there. I wouldn't know about the delivery date.

Q. It said packed 2/52. Right? A. Yes, sir. Date packed, 2/52.

Q. Undoubtedly they were packed in 1952? A. Yes.

Q. Now, Commander, you are not a chemist? [213] A. No, sir.

Q. You know nothing about chemistry or contents of chloroform or what it looks like or should look like or anything else in a bottle? A. I wouldn't go so far as to say I know nothing about it, but I do not claim to be an expert in chloroform or I do not specialize in that particular field.

Q. These spots you talked about floating in the liquid chloroform that you observed in a couple of bottles of several bottles and then made an estimate that they were in so many bottles, had you ever looked at bottles of chloroform before? A. Oh, I have seen bottles of chloroform on other cases, yes.

Q. And you never before in a bottle of chloroform saw what you saw in these? A. I can't say I saw spots floating before because personally I had never set out to find it before, and I didn't set out to find it then. It is just the fact when you hold something before the eye and see dark particles are floating you are bound to pick them up, especially if you are observing pretty closely the object.

Q. Yes, but not knowing anything about chloroform, there was no significance attached to it in your mind because that might be so in any bottle of chloroform? A. You are pushing me over now to become an expert in a

question [214] on something I particularly did and in another thing that I was not instructed to follow.

Mr. Driscoll: That is all. Just a moment. That is all, Commander. Thank you very much.
Mr. Packard: No further questions.

(Witness excused.)

ETHEL WEISSMAN, recalled as a witness in behalf of the Government, having been previously sworn, testified as follows:

Direct examination by Mr. Packard:

Q. Miss Weissman, you brought with you again today those papers from your file? A. Yes, I did.

Q. May I have the last five or six of them. Suppose you just give me the last three. That is all we will bother with.

(Witness hands papers to Mr. Packard.)

Q. Miss Weissman, in this particular contract you have what is known as a guaranty clause? A. We do.

Q. And as I understand that clause provides that in event of defective material being shipped out, the Agency can make a demand upon the contractor to replace the material. That is one of the options, is it not? [215] A. It is.

Q. And the other option is that the Agency can demand that the contractor reimburse the agency for the material, is that correct? A. That is correct.

Q. Now, after this complaint sample had been received from Fort Totten and the laboratory finding of non-conformity, did the Agency suspend the issuance of the bottles in the two lots 2081 and 2105? A. Yes, we did.

Ethel Weissman—for Government—Recalled—Direct

Q. And about how many bottles had been used up whe the suspension order was issued—just approximately? A To my recollection, several forms of possibly two or three thousand.

Q. So the bottles that Commander Sullivan examined represented the large bulk of the bottles which had not been used up; is that correct? A. That is right. There were about 44,000 bottles left.

Q. And they had been suspended from use? A. That is correct.

Q. And as far as you know, they are still out at the depot, being in the suspense state? A. Yes, they are still in the suspension state.

Q. Now in this particular case did the Agency exercise [216] one of the two options under the guaranty clause? A. Yes, we did.

Q. And which of the options did the Agency exercise? A. We exercised the option to request reimbursement for the material on hand in the depots, and we requested disposition and instructions from the contractor or Private Brands for that material.

Q. You mean when he paid back the Agency the money which he had obtained, then he was entitled to receive the materials for such purpose as he wanted to make of it, is that correct? A. That is correct, or to advise us to dispose of it in accordance with existing regulations.

Q. Now, if the Agency in a case like this exercised the option for reimbursement, does Private Brands have any means of appealing from the option? A. Yes.

Q. Did they have any way of appealing from your decision that the material is defective? A. Yes, they did.

Q. What is the means, in your usual course of business, of exercising the option to require reimbursement? A. We send a registered mail letter to the contractor in the first instance advising him of the defect. Then we advise him the quantity of material we have on hand and the value of

the [217] material. We make a demand for payment on it and then we advise him by what means he may appeal from this decision.

Q. And do you keep copies of any letter or letters you send out in your own file? A. Yes, we do.

Q. Will you please identify these two letters? A. The first is a letter dated January 26, 1953, addressed to Private Brands, referring to Order No. 36603 and 36603-1-2 of chloroform USP.

In this letter the contracting officer advised Private Brands that the Agency had received complaints relative to Lots Nos. 2081 and 2105. We also advised that the complaints were being investigated and should they be confirmed and found justified, it would be necessary to invoke the guaranty clause, provision 27.

That is the first letter.

The second letter was dated February 18, 1953, sent by registered mail to Private Brands, referring again to Order 36603 and the two delivery orders, mentioning the lot numbers and the description of the material, supplementing this letter of January 26th, advising them the result of the investigation, as provided by the guaranty clause, invoking the guaranty clause, advising how much material there was on hand, the cost of it, the request for payment and the advice as to how they [218] could appeal, a statement that this constituted a final determination.

Mr. Packard: I offer the two copies of letters in evidence.

Mr. Driscoll: No objection.

The Clerk: Two letters, Exhibit 56.

(Two letters referred to are marked Government Exhibit 56 in evidence.)

Q. And what was the date of the second letter, Miss Weissman? A. The registered mail letter was February 18, 1953.

Q. And are the words "registered mail" typed in on the copy there? A. Yes, it says "Registered Mail, Return Receipt Requested."

Q. Now, under the appeal provisions of the contract how much time does Private Brands have in order to exercise its right to appeal? A. Thirty days.

Q. And does the appeal have—does the notice of appeal have to be in any formal manner, or can it be done in a letter? A. It can be done merely by a letter, which could be quite informal and in fact need not even specify the details of their appeal. All it need say is that they intend to file an appeal [219] and to state the order number and the stock number. It could be a very simple letter—just a notice that they are going to appeal.

Q. And in this case, if I understood correctly, he had this right to appeal up until March 18, 1953, is that correct? A. That is correct.

Q. And did you receive a notice of appeal or the intent to exercise the appeal right on that day? A. No, sir, we did not.

Q. And was there any communication received subsequent to March 18th from Mr. Carey? A. I believe there was correspondence subsequent to that day.

Q. I will ask you to take a look at this letter and tell me if you are able to identify it. A. This is a letter dated April 1, 1953, from Private Brands addressed to the contracting officer referring to Order No. 36603 and delivery orders 1 and 2.

Mr. Packard: I believe I will offer it in evidence.

Mr. Driscoll: No objection.

The Clerk: Government Exhibit 57.

(Letter referred to is marked Government's Exhibit 57 in evidence.)

Mr. Packard: May I have your Honor's permission to read a portion of this letter to the jury?

[220] The Court: Yes.

Mr. Packard: Your Honor and members of the jury, this letter is on the Private Brands letterhead, 1 Pleasant Avenue, Clifton, New Jersey. It is dated April 1, 1953, and it makes reference to the letter of February 18th.

Over on Page 2 it says: "Over-labeling—Originally, we had prepared Lot No. 2049, samples of which had been taken by your inspector on the 18th of February, 1952; which carried labels with an improper stock number. On receipt of your notification of the 3rd of March, 1952, advising that a rejection had been made on the samples submitted on this lot #2049, we emptied and drained all the bottles of this lot, filtered and redistilled the contents and, after examination of the material, refilled the bottles • • •

" • • • since the labels originally had been affixed to the bottles with a waterproof adhesive, we applied new labels, carrying the proper stock number, on top of the old labels, securely affixed with a new coating of waterproof adhesive. With the view in mind of the greatest efficiency in the final package, which consideration included care not to contaminate the inside of the bottle with foreign materials (including water), as well [221] as consideration for supplying the finished material as quickly as possible since we were advised that the material was in urgent demand, we decided to firmly place the correct label over the label already in existence, and it was this lot that was sampled and approved under Laboratory Report #74684.

• • •

"The number of bottles involved in this issue of over-labeling is in the magnitude of 25,000 or slightly less.

• • •

"Very truly yours,
"Private Brands, Inc.,
"Francis P. Carey, President."

The Court: We will suspend. We will take a short recess.

(Short recess.)

ETHEL WEISSMAN, resumed.

The Court: Had you finished reading that letter?

Mr. Packard: I finished reading the portions that I wished to read, your Honor.

By Mr. Packard:

Q. Just one further question, Miss Weissman. To your knowledge in the course of your employment at the Agency, has [222] the Agency ever purchased technical chloroform? A. No, sir, we have never purchased technical grade chloroform.

Q. Only USP? A. Only USP.

Mr. Packard: No further questions.

Cross-examination by Mr. Driscoll:

Q. Miss Weissman, there is an exhibit, I believe a letter dated February, February 18th, if I recollect it, wherein you notified the FBI that their material is not up to what is requested? A. Yes, sir.

Ethel Weissman—for Government—Recalled—Cross

Q. And you also testified that the company has a right to appeal from your statement within 30 days? A. From the decision, yes, sir, they have a right to appeal from the decision within 30 days.

Q. When is the letter, that letter that he gets? A. The decision is contained in the letter of February 18, 1953.

Q. Right. Now I show you a copy of a letter and ask you if you did not receive that? A. (After examining.) This letter does look familiar to me.

Q. Would you by any chance have the original? A. I don't have it amongst my exhibits here.

Mr. Driscoll: I would like to offer it in evidence [223] if you don't have the original.

Q. Is there any doubt that you received that? A. I wouldn't care to say positively. However, it does appear familiar. I would have to check my own file, however, to verify it.

Mr. Driscoll: I would like to mark it for identification.

The Clerk: Defendant's Exhibit A for identification.

(Letter referred to was marked Defendant's Exhibit A for identification.)

Q. You notice the date of that letter? A. Yes, I do notice it.

Q. What was the date, do you remember? A. March 10.

Q. March 10, 1953, and the other letter that is in evidence was February 18, 1953? A. That is correct.

Q. Now, if you did receive that letter—noting and keeping in mind the dates of each respective letter—was there not an appeal from your determination within 30 days?

A. I wouldn't say that that letter represented an appeal from the determination, no, sir. If I may explain.

Q. No. I will ask you the question. A. Yes, sir.

[224] Q. I show you a letter dated February 18th from your office to Private Brands. Is that the original of the letter you referred to in direct testimony, notifying Private Brands that the material and the contract was not properly filled? A. Yes, this is the original.

Q. Now I ask you to read therein in that letter from you to Private Brands the paragraph notifying of its rights to appeal. Kindly read it to the jury. A. (Reading): "This constitutes a final determination in this matter, and in event of disagreement therewith your attention is invited to contents of Provision 12 of the subject contract, and the attached statement relative thereto."

Q. Now, read the attached statement that you refer to as to its right to appeal. A. (Reading): "This letter constitutes the findings of fact pursuant to—"

Q. No, no. The last part is Mr. Sackson's. You don't read it all, necessarily—down in the middle there it says within 30 days you shall do so and so. A. (Reading): "A notice of appeal must be addressed to the Secretary of the Army and must be mailed to or filed with the undersigned Contracting Officer within 30 days after receipt of these findings and decision."

Q. Now, does Exhibit A for identification—I showed you [225] a copy of a letter which you are not sure but you think you received in your office. A. I believe that I did receive it, but I would have to verify the files.

Q. Do you now say that that letter of March 10 was not a notice of appeal pursuant to this instruction? A. Do I now say that this letter of March 10 is not a notice of appeal?

Q. Yes. A. I couldn't possibly construe that letter as a notice of appeal.

Q. You wouldn't construe it? A. No, sir.

Q. In those words you just said? A. No, sir.

Q. Now I show you a copy of a letter dated May 12, 1953, from Private Brands to your office and ask you if you recognize it and did you receive the original thereof? A. Here, again, I would say that this letter is familiar to me. I believe I did see it but I would have to verify it with the file as to whether we have the original.

Mr. Driscoll: I would like to offer this for identification.

The Court: Just have it marked for identification.

The Clerk: Defendant's Exhibit B for identification.

[226] (Letter referred to is marked Defendant's Exhibit B for identification.)

Q. You have read this letter? A. Yes, I read it.

Q. It was a request by Private Brands, Inc., to your office for you to let them take sample bottles and have it tested, the bottles that you had rejected, tested by an independent outside chemist.

The Court: Mr. Driscoll, you are now referring to the contents of a letter which is not in evidence.

Mr. Driscoll: I am sorry, Judge. You are right.

Q. Now let me ask you this: Do you recall having received a request from Private Brands that you permit them to take any sample bottles of the rejected stock that you had notified them that you had rejected and have it taken to a private outside chemist for analysis as to the contents? Do you recall a request on behalf of PBI for that? A. Yes, I do.

Ethel Weissman—for Government—Recalled—Cross

Q. Did you grant that request? A. No, it was not granted.

Q. Is that customary? A. Yes, it is customary.

Q. You never permit—you have never permitted such a thing? A. I couldn't say never, because I don't know what action is done in other occasions or by other contracting officers. I really couldn't say it has never been done. I [227] couldn't say one way or the other. I don't know. In my own experience and in my own section I don't recollect the contracting officer ever permitting such a thing.

Q. Is there somebody else in the Federal service other than your particular agency or division that you talk about that does, has some say as to whether or not this is permitted, or are you the exclusive authority as to whether or not it is permitted? A. I would say that the contracting officer makes the final decision as to whether or not it would be permitted. Whether he refers to his own superiors as a matter of getting advice on the subject and whether, what other means he has of substantiating his own position, that I do not know, but it is up to him to make the final decision.

Q. Are you a contracting officer? A. I am not.

Q. What is your exact position? A. I am a purchasing agent or, more specifically, a supervisor.

Q. Under a contracting officer? A. Under a contracting officer.

Q. Who was Major Barton. A. Who was Major Barton at that particular time.

Q. Did the request that you admit having received from [228] Private Brands to have samples and have an outside chemist do them—was that request forwarded by you or transmitted by you to the contracting officer who was Major Barton? A. Oh, I just thought of something. If I may. I believe at that particular time Major Barton was no longer with the Agency. If my memory serves me correctly, Captain Brünn was the successor contracting officer and he probably made that decision.

Q. I won't mention his name. Let me put it this way: When you received from Private Brands the request for this right, did you transmit that request to the contracting officer under whom you worked? A. Yes, sir.

Q. Did he reject it? A. If it was rejected, he would have had to reject it.

Q. You wouldn't know whether he did or not? A. To the best of my knowledge, the request was rejected.

Q. And you know nothing—how many contracting officers were there in the Government at that time?

The Court: In the Government?

Q. In the—well, let me word it this way: Did your contracting officer in Sands Street purchase these sorts of things and all sorts of things for the whole United States or were there other officers that purchased? [229] A. Well, there were other officers that purchased other commodities. We purchased drugs and pharmaceutical commodities in Buying Section No. 1. There were no other commodities, just those.

Q. No. Were there any other officers in the United States purchasing the same type of materials as you were here, located in any other part? Did you purchase the things that you say you unquestionably purchased—were you the only purchasing agent for the whole United States?

Mr. Packard: I object to the form of the question.

The Court: I will overrule the question.

A. The Armed Services Medical Procurement Agency has procurement responsibility for the items that are listed in our catalog, and specifically in the Class 1 catalog—drugs, chemical, pharmaceuticals and biologicals. However, it is not without the realm of possibility that some small post,

camp or station located in the United States who might have an urgent requirement, say one or two or ten bottles of something, would try to get it from their regular special channel, might conceivably go to the corner drug store in their own post area and buy it. They have a small fund set aside for such purposes. But overall, and considering the procurement responsibility for those items, it does rest with the Armed Services Medical Procurement Agency.

[230] Q. And that is your office here in Brooklyn? A. That is my office.

Q. And you, I believe, said in answer to a question of mine before that you know of no instance in which such a request as was received from Private Brands was ever acknowledged or permitted? A. I can't think offhand of any such circumstances. It would have been an extremely unusual thing.

Q. And you would know about it, even though the contracting officer might have done it you would have to know about it, would you? A. I would have known about it. Anything that is done that is unusual or out of the way, the contracting officers usually advise the purchasing agents of.

Q. Oh, you mean this was an out of the way and unusual and extraordinary request that we made? A. The request appeared to be unusual.

Mr. Driscoll: Pardon me just a moment.
(Mr. Driscoll confers with client.)

Q. Do you know a Mr. Sawyer? A. A who?

Q. A Mr. Sawyer. A. Yes.

Q. Of Private Brands? A. Yes, I have met him.

Q. An employee of Private Brands. Did you discuss this question of rejection with Mr. Sawyer? [231] A. I believe there were some discussions with Mr. Sawyer.

Q. Did you advise him how to take an appeal or discuss with him, say, the question of appealing from your determination? A. Yes.

RAYMOND L. JOHNSON, called as a witness on behalf of

Q. You told him how to take an appeal? A. Well, actually the whole method by which an appeal can be taken is very clearly spelled out in the letter of February 18. However, I do recall amplifying it and advising him to take the appeal, if they intended to take an appeal, pointing out that it must be taken within 30 days. I do recall that, yes.

Q. And that was within the period of 30 days? A. Oh, yes.

Q. In plenty of time? A. (No response.)

Mr. Driscoll: That is all. Thank you.

Mr. Packard: No further questions, Miss Weissman.

(Witness excused.)

Mr. Packard: Special Agent Raymond Johnson.

RAYMOND L. JOHNSON, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct examination by Mr. Packard:

Q. Mr. Johnson, you are a Special Agent of the Federal [232] Bureau of Investigation? A. Yes.

Q. And where are you stationed? A. Newark, New Jersey.

Q. How long have you been with the Federal Bureau of Investigation? A. As an Agent, for approximately five and a half years.

Q. What is the nature of your education in secondary school and graduate, undergraduate? A. I have a Bachelor of Commercial Science Degree. I am a graduate of Benjamin Franklin University in Washington, D. C.

Q. And, Mr. Johnson, in the course of your official duties were you assigned to an investigation in connection with the Private Brands contract for chloroform with the Armed Services Medical Procurement Agency in January 1952? A. Yes.

Q. And in the course of your investigation did you have occasion to visit the Private Brands plant at Clifton, New Jersey? A. Yes, I did.

Q. And what was the date, Mr. Johnson, of your first visit to Private Brands? A. June 25, 1953.

Q. And on that date did you meet Mr. Carey? A. Yes, I did.

[233] Q. Did you talk to Mr. Carey? A. Yes.

Q. Did you tell him anything about the nature of the investigation that was being conducted? A. Yes.

Q. And what did you tell him as to the investigation? A. I advised him our office had been requested by the United States Attorney's Office in Newark to make an investigation to determine if there had been any violation of Federal law in connection with the supplying of chloroform to the Armed Services Medical Procurement Agency under a contract.

Q. And did you advise them that you wished to question Mr. Carey? A. Yes.

Q. And did you tell him that he had the right to remain silent?

The Court: Now, Mr. Rackard, you had better ask the witness what he told Mr. Carey.

Mr. Packard: Thank you, your Honor.

Q. What did you tell Mr. Carey, Mr. Johnson? A. In relation to the investigation?

Q. Yes. A. I advised Mr. Carey that anything—that he didn't have to make any statements to us—I was accompanied by Special Agent Louis Hogan—and that anything he said could be held against him in a court of law.

[234] I also advised him he had the right to consult an attorney about being interviewed.

I asked him if he was willing to be placed under oath.

I advised him that we had seen a copy of the April 1, 1953, letter from Private Brands to the Armed Services Medical Procurement Agency, wherein he stated that the chloroform of Lot 2049 had been redistilled and filtered and I asked him if he could produce records to substantiate this statement in that letter.

Q. And what was his reply to that question? A. He advised he would have to obtain consent of counsel prior to producing any records.

Q. And did you inquire of him whether he had any personal knowledge of the redistilling or filtering of the chloroform in Lot No. 2049? A. Yes.

Q. And what was Mr. Carey's reply to that question? A. I asked him that question on more than one occasion during that interview, and on the first occasion he said that the chloroform was reworked.

The Court: Was what?

The Witness: Was reworked by Mr. Robert Ehrlich and others.

[235] At a later point in the interview he mentioned that the chloroform had been reworked and that he did it.

The Court: And that he did it?

The Witness: He did it.

The Court: Keep your voice up, Mr. Johnson.

The Witness: Yes, I will.

Q. Did you ask him at this particular interview what was the nature of the reworking of the chloroform, the nature of the process which he had done in this particular interview? A. Yes.

Q. What was Mr. Carey's reply? A. He didn't recall exactly how it was done.

Q. Did you ask Mr. Carey if on the receipt of the chloroform from du Pont whether he had conducted any test to determine the quality of the chloroform? A. Yes.

Q. And what was Mr. Carey's reply to that question? A. He stated he did not recall. He advised occasionally that it was not done because it was purchased from reputable dealers.

Q. And did you ask him whether any tests had been made on the chloroform after it had been rejected? A. Yes.

Q. And what was Mr. Carey's reply to that? [236] A. He stated tests had been made.

Q. And did you ask him if he had any records of those tests? A. He stated he did not know for sure if he had records of such tests.

Q. Did you ask Mr. Carey in this first interview on June 25 whether he recalled the identity of any of the other persons who allegedly reworked the chloroform with him? A. Yes.

Q. And what was Mr. Carey's reply to that question? A. He did not know the identities other than Mr. Ehrlich.

Q. And was there anything else that you can recall that you asked Mr. Carey in this first interview? A. I asked him various questions.

Q. Did you ask him anything about the relabeling or over-labeling of the bottles on the first lot that was shipped out? A. Yes.

Q. And what was Mr. Carey's reply—did Mr. Carey tell you who did the relabeling or over-labeling? A. Yes.

Q. What was his reply? A. He advised the relabeling would have been done under the supervision of Robert Ehrlich.

Q. This Robert Ehrlich, what position does he hold at Private Brands? A. Mr. Carey advised that he was production manager.

[237] Q. Now, you had a second interview with Mr. Carey, did you not? A. Yes.

Q. And did that also take place at Private Brands? A. A second interview took place on the street outside of Private Brands.

Q. Were you accompanied by another Agent at that time? A. Yes.

Q. And what did you say to Mr. Carey at the second interview and what did he say to you?

The Court: When?

Q. What was the date of the second interview, Mr. Johnson? A. July 21, 1953.

Q. And what did you say to— A. I would like to make a correction.

Q. Certainly. A. The second interview was July 16, 1953.

Q. And what did you say to Mr. Carey and what did he say to you? A. I asked Mr. Carey as to whether he had obtained consent of counsel to make available the records to substantiate his statements and as to when they would be made available. He advised that they were in process of assembling them and they would be made available on July 21, 1953.

Q. Did you see Mr. Carey again on July 21, 1953? A. Yes, I did.

[238] Q. Were you accompanied by another Agent at that time? A. Yes.

Q. And did you ask Mr. Carey for the record? A. Yes.

Q. What was Mr. Carey's reply? A. He advised the records were not ready. He stated he was in process of preparing a statement concerning the handling of the chloroform and that with the consent of William Buckner, the corporation's counsel, he would make that available.

Q. Did you see Mr. Carey again? A. Yes.

Q. And what was the date that you saw him the next time? A. August 4, 1953.

Q. And was that also at Private Brands? A. Yes.

Q. And were you accompanied by another agent? A. Yes.

Q. Who was that agent? A. Special Agent Louis Hogan.

Q. And at that time in the August 4 interview did you question Mr. Carey further concerning the further reworking of the chloroform? A. Yes, I did.

Q. And did he tell you—I will withdraw that.

Did you ask him on what date or dates the alleged reworking took place? A. Yes.

Q. And what were the dates? [239] A. He advised the reworking took place somewhere between March 7 and March 24 of 1952 on two weekends.

Q. And where did it take place, according to Mr. Carey? A. He advised that it took place at Private Brands, principally.

Q. Did Mr. Carey reiterate his statement that he personally had done the reworking of chloroform? A. On this occasion he advised in answer to my question, yes.

Q. And did he give you the names finally of the other people that they had at Private Brands who participated in the reworking? A. Yes.

Q. And what were their names? A. Robert Ehrlich and Anthony Carpanelli.

Q. And did he tell you who Anthony Carpanelli was? A. Yes.

Q. Who was Anthony Carpanelli? A. He advised he was an employee of the Contract Packaging Company of Lodi, New Jersey.

Q. And that is the Contract Packaging Company? A. A packaging concern, to my knowledge.

Q. Now, did Mr. Carey make available to you a statement at any time, a written statement? A. Yes, a typewritten statement.

Q. And did you read that statement? A. Yes.

Q. And did Mr. Carey allow you to keep the statement or [240] did he take it back from you? A. The statement he advised on a previous interview was being prepared for us and he furnished Agent Hogan and myself the statement. However, at the conclusion of the interview I would not accept it.

The Court: Didn't accept it?

The Witness: Didn't accept it.

Q. And did you copy any extracts from the statement? A. Yes, we did.

Q. And did Mr. Hogan copy any extracts from the statement? A. Yes.

Mr. Packard: At this time, if your Honor please, I would like to withdraw Agent Johnson and put Mr. Hogan on the stand.

The Court: All right.

Mr. Driscoll: If your Honor pleases, I don't know the purpose of that. Why not complete the witness's testimony and then call the other witness?

Mr. Packard: Well, the purpose, if your Honor please, is this: that Mr. Hogan copied a portion of the statement and Mr. Johnson copied a succeeding portion of the statement. So, in order to give continuity to the reading of the extracts.

The Court: Suppose you finish with the examination [241] with the exception of that statement and then you may recall Mr. Johnson after Mr. Hogan has testified.

Mr. Packard: Very well, your Honor.

Q. Now, did you ask Mr. Carey if he had located any records as to the tests made at any time on the chloroform? A. On August 4th, yes.

Q. And what was Mr. Carey's reply? A. He had not located any.

Q. Mr. Johnson, would you please describe to us, in your own words, that portion of the, the substance of that portion of the statement which describes alleged reworking of chloroform, to the best of your recollection. A. My recollections are that the statement reflecting the chloroform was reworked through the adding of activative charcoal to it and filtering it.

Q. Did Mr. Carey describe the part of the preparation which he said he participated in—well, that is the question. A. We questioned him as to how—what steps were taken.

Mr. Driscoll: If your Honor please, I am not clear whether this is a new question upon his recollection that he received from Mr. Carey.

The Court: I am not sure, either.

Q. The question is, is your recollection of the statement [242] that the statement set forth anything about Mr. Carey's participation in reworking? A. I do not recollect this was set forth in the statement.

Q. Now, apart from the statement, Mr. Johnson, did you have any conversation with Mr. Carey about the alleged reworking of the chloroform? A. Yes.

Q. And what did you say to Mr. Carey and what did he say to you? A. I asked him a series of questions as to the steps that were taken in the reworking of the chloroform.

Q. And what did Mr. Carey say the steps were in the reworking? A. He advised—

The Court: Don't say he advised. He said. Advised is not the term.

The Witness: Sorry.

A. He said that the cartons in which the chloroform had been packed were re-opened. He said they were all re-

taped, if taped at all; that the bottles were taken out; that they were placed on a drainboard which had drill holes in it over the top of the tank and the tank was filled after the charcoal was added and the chloroform was filtered; that it was then refilled back into bottles with a rotary filler and the bottles were capped and placed back into the cardboard cartons [243] from which they had been removed, and they were left for the relabeling crews to label.

Q. Did Mr. Carey say at any time that the reworking operation took place at any time other than week ends? A. Would you repeat that question?

Q. Did Mr. Carey say that the reworking operation took place at any time other than on week ends? A. No.

Q. Now, did you have another interview with Mr. Carey? A. I asked Mr. Carey a few questions on October 8, October 6 and 8, 1953, while reviewing records at Private Brands which were produced by Mr. Greisel.

Q. Who was Mr. Greisel? A. Mr. O. J. Greisel. He is the comptroller and director of Private Brands.

Q. And was he present at the, I believe you said October 6th— A. Yes.

Q. (Continuing) —interview which you had with Mr. Carey? A. Yes.

Q. And at that time did you obtain any records from Mr. Carey or Mr. Greisel? A. Mr. Greisel made available records for review on that date.

Q. And did you keep any of those records? A. Not at that time.

[244] Q. Did you subsequently obtain some of the records, some records from Mr. Greisel? A. Yes.

Q. And what was the date on which you obtained those records? A. October 28, 1953.

Q. And where were these records obtained by you? A. From Mr. Greisel's office in New York City.

Q. And did you give Mr. Greisel a receipt for the record? A. I did.

Q. And did you keep a carbon copy of the receipt? A. Yes.

Q. And does that carbon copy of the receipt show that you receipted for any records known as plant work tickets or line operation sheet? A. None that were described in that way.

Q. Now, going back for one moment to the October 6th interview with Mr. Carey at Private Brands attended by Mr. Greisel, at that time did Mr. Carey show you any of the equipment which he said had been used in the reworking? A. Yes.

Q. And what pieces of equipment did he show you? A. Stainless steel tanks and rotary type filler and a filtered press and a hoist, a car hoist of some type. I don't know the name of it.

[245] Q. Now at any time in the course of the investigation did you interview Mr. Ehrlich? A. Yes.

Q. And what was the date of the interview of Mr. Ehrlich? A. August 5, 1953.

Q. Was that the only interview you had with Mr. Ehrlich? A. Yes.

Q. Did you interview Mr. Carpanelli at any time? A. Yes.

Q. How many interviews did you have with Mr. Carpanelli? A. Two.

Q. And what were the dates of those two interviews? A. August 5, 1953, and December 28, 1953.

Q. Now, in the interview with Mr. Ehrlich did you ask him if he had participated in the reworking of chloroform? A. Yes.

Q. And what did he say? A. He advised he had.

Q. And did he also advise that he had done it with Mr. Carey and Carpanelli? A. Yes.

Q. And did he say it was done on week ends in March of 1952? A. Yes.

Raymond L. Johnson—for Government—Direct

Q. And on the second interview with—I withdraw that.

On the first interview with Mr. Carpanelli did you ask him if he had participated in the reworking of chloroform? [246] A. Yes.

And did he say he had? A. Yes.

Q. And did he say that Mr. Carey and Mr. Ehrlich had also participated in the reworking of chloroform? A. Yes.

Q. And did he say he had been down on successive week ends in March of 1952? A. He did not recall the time that it was done.

Q. And you had a second interview with Mr. Carpanelli? A. Yes.

Q. And did you reiterate your question whether he had participated in the reworking of chloroform? A. Yes.

Q. And what was the answer on this occasion? A. He advised he had not.

Q. And did you ask him what induced him to tell you why on the first interview he had said he had reworked chloroform?

Mr. Driscoll: I object to the question—what induced him.

The Court: Yes.

Mr. Driscoll: I object to that question—what rephrase it.

Q. Did you ask Mr. Carpanelli why he had originally told you that he had participated in the reworking of chloroform? [247] A. Yes.

Q. What was his answer? A. He advised—he said that someone whose name he didn't disclose from Private Brands had requested him to state that he participated in the reworking. He said someone said that there was a routine check being made on the chloroform and that everything had been reworked and that the company had proof of it and that it had been said that Carpanelli participated in the reworking and that he had been asked to go along with those statements.

Q. And at this second interview he said that his original statement was false; is that correct? A. Yes.

Q. Now, prior to your first interview with Mr. Carey on June 25, 1953, did you have any interview with any of the Private Brands personnel? A. No.

Mr. Packard: No further questions.

Cross-examination by Mr. Driscoll:

Q. Mr. Johnson, you say you were detailed from the FBI to check on the plant of Private Brands, Inc., the matter of this shipment. Right? A. Yes.

Q. You have been in the department for five years? [248] A. Not at that time I had not.

Q. You had not? A. Yes.

Q. How long were you in the—two years at that time, was that? A. That was in 1953. Four years.

Q. Four years. Are you a chemist? A. No, I am not.

Q. Are you a lawyer? A. No.

Q. So that when you questioned or asked Mr. Carey what he used for reworking you didn't know what was necessary for reworking, you just asked him to tell you how he reworked it; is that right? A. Yes.

Q. And he showed you the steps and the equipment or machinery that was used and how a rework was done; is that right? A. He showed various equipment and told how it was done, yes.

Q. And you asked Mr. Carey about this relabeling. That was one of the complaints that you had to check up on; is that right? A. I asked him concerning the relabeling, yes.

Q. And what was his answer to that? A. He advised it had been relabeled under the supervision of Robert Ehrlich and others.

Q. And he personally didn't know anything about it; is that right? A. No. He stated it was his decision alone to do this [249] relabeling.

Q. Mr. Carey said he decided to relabel it? That is what he told you? A. Yes.

Q. But if it was relabeled it was done under the supervision, I presume, of somebody else, one of his employees?

The Court: That wasn't the witness's answer. He didn't say he presumed it was done by someone there.

Q. What did he say to you? A. Mr. Carey told me the relabeling was done under the supervision of Robert Ehrlich.

Q. And the question of records you said, as I have it here, about five or six interviews, as you term it, and that you asked him at the third interview on the 21st—no, you changed that, that is right—you said your next interview was the 21st and then corrected it, but you had one on the 16th, that is the second interview, having started the first interview on the 25th of June; is that right? A. Yes.

Q. And you did have a second interview on the 16th of July? A. Yes.

Q. And a third interview on the 21st? A. Yes.

Q. Of July? A. Yes.

Q. And it was on the 16th of July that you first asked Mr. Carey for the record? [250] A. No.

The Court: He asked for the record in the first interview.

Q. When did you first ask Mr. Carey for records? A. June 25, 1953.

Q. Then you asked him again on the 16th? A. Yes.

Q. You finally got the records, didn't you? You were finally given the records? A. Yes, on October 6th.

Q. They were turned over to you by the corporation or an officer of the corporation? A. Yes.

Q. Or some employee of the corporation. You received them? A. Yes.

Q. And you receipted for them? A. Yes.

Q. Now, this statement that was referred to, as I recollect, you stated that Mr. Carey had a written or typewritten statement and wanted you to take it and you refused to take it? A. Yes.

Q. What did you do with it? A. I returned it to Mr. Carey at the conclusion of the interview.

Q. Well, you gave Mr. Packard on direct examination what its contents were, as I recollect it. Did you read it? A. Yes.

[251] Q. So you read it fully and completely and then refused to keep it? A. Yes.

Q. There was no denial to you, was there, that they had—that the bottles had been relabeled? A. No.

Q. And that there was rework done—what they termed they had reworked a certain lot of cases or bottles? A. Yes.

Q. They didn't deny it? A. No.

Q. Voluntary information given to you? A. Yes.

The Court: I wish we could proceed a little more rapidly, Mr. Driscoll.

Mr. Driscoll: I am trying to. I am sorry, Judge.

Q. Mr. Johnson, with reference to that statement which was offered to you and which you refused to accept, let me ask you this: Did Mr. Carey give you full cooperation when you were at his plant at the interviews—or I will word it this way: Did he cooperate with you while you were there and doing your duty?

Mr. Packard: I object to the form of the question, your Honor. I also object on the ground that it calls for a conclusion.

The Court: Overruled.

Q. Did he, Mr. Johnson? [252] A. He cooperated.

Q. Did he? A. He cooperated, yes, sir.

Q. Now, why did you refuse to accept the written statement that Mr. Carey handed you? A. I asked Mr. Carey for a statement setting forth that he was advised that he did not have to furnish that statement to us and that if he did furnish it to us it could be used against him in any court of law—civil or criminal—and he declined to give a statement to that effect. He wanted assurance that the statement would not be used against him in any civil or fiscal action.

Q. Civil or fiscal action? A. Yes.

Q. And because of that you refused it? A. And therefore I did not accept it.

Q. Now, didn't Mr. Carey go over with you while you were there a reconciliation of inventories against shipments? A. In form, yes.

Q. Do you recollect the date of that? A. October 6, 1953. It was not actually a reconciliation between shipments. I don't know how you describe it. Mr. Greisel produced a stock card record which listed chloroform purchased and chloroform expended.

Q. I was just going to say that. And Mr. Greisel was [253] present? A. Yes.

Q. During this. What happened right after that? A. I do not understand the question.

Q. Well, you have stated that he went, Mr. Carey went over with you this reconciliation of inventories against shipments and Mr. Greisel was also there—right—going over this? A. Yes; and it was principally Mr. Greisel furnishing information. Mr. Carey was there at that time.

Q. And it showed a balance? A. It showed a balance as of a given date.

Q. Now when you were going over that data for this purpose did something turn up at that time and was it discussed?

The Court: What do you mean? Nobody could answer a question like that.

Q. Was a third contract turned up? A. I don't know what number contract it was. There was an additional contract turned up.

Q. An additional contract? A. Yes.

Q. Was discovered at that time? A. That is right.

Q. Would you know—you say this was October 6th—this reconciliation discussion that we are talking about, and while doing this reconciliation of shipments against stock suddenly with Mr. Greisel and Mr. Carey it was discovered that there [254] was a third contract from the Government or an additional contract for some 10,000 bottles? A. Yes. I became aware of it at that time.

Q. You became aware of it. Did Mr. Carey say he was surprised, and Mr. Greisel? A. I don't recall.

Q. You don't recall. Now, do you know whether or not shortly thereafter Private Brands, Inc., received a rejection of the material under that additional contract? A. I believe I am aware of a rejection, but the date I do not recall.

Q. You do not recall the date of the rejection? A. No.

Q. Was it within two weeks of October 6th? A. I would have no way of knowing.

Q. Well, you know there was a rejection? A. I understand there was some form of action. Whether rejection or not, I am not sure.

Q. Somebody told you? A. I don't recall that.

Q. Whether they told you, how soon after that date that was done you don't recall that? A. No.

Q. Mr. Johnson, who told you there was a rejection of this contract? [255] A. No one personally, orally informed me. I believe I was advised through a report of another office of something to that effect. I don't recall as to whether it was a rejection or what exactly.

Q. Did you say anything to anybody after October 6th about the contract—I mean in the Government? A. Yes.

Q. To whom did you say something and when? A. I requested our New York office to make an inquiry at the Armed Services Medical Procurement Agency to obtain the details regarding the second, this additional contract.

Q. How soon after the 6th? A. It may have been in November right after October 28, after I obtained the records. I am not sure of that date.

Q. About a month later, within a month later or something? A. Yes.

Q. So you just notified another FBI office, is that it? A. That is right.

Q. I am sorry. I thought you said the medical office. A. Another FBI office.

Q. FBI office? A. That is right.

Q. And you don't recall definitely when somebody orally said to you that there was a rejection on that contract that you had discovered on October 6th?

[256] The Court: Why go over it. He told you about it. Why repeat it?

Mr. Driscoll: Well, he remembers when he told the FBI.

The Court: Do not argue.

Q. You don't recollect? A. No.

Mr. Driscoll: That is all, your Honor.

The Court: Anything more, Mr. Packard?

Mr. Packard: Just one question, your Honor.

By Mr. Packard:

Q. Mr. Johnson, at any time did you receive a sworn statement of any kind from Mr. Carey? A. No.

Mr. Packard: No further questions.
Mr. Driscoll: One further question.

By Mr. Driscoll:

Q. Did you know that 50 per cent of that stock, that additional contract, had already been used by the Government? A. No.

Mr. Packard: I object to the question.
The Court: I will sustain the objection

(Witness excused.)

Mr. Packard: Mr. Ehrlich.

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[257] ROBERT EHRLICH, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct examination by Mr. Packard:

Q. Mr. Ehrlich, where are you employed? A. Private Brands.

Q. And how long have you been employed at Private Brands? A. Since April of 1950.

Q. And in what capacity are you presently employed at Private Brands? A. Production manager.

Q. And how long have you had that position? A. Approximately two years.

Q. And in the year 1952 in what capacity were you employed? A. I believe I was the production manager at that time.

Q. And what are your duties generally as production manager? A. I schedule the production and have the necessary machinery set up and assign girls and people to the jobs which we have to do.

Q. Now, Mr. Ehrlich, do you recall the contract which Private Brands had in 1952 to furnish chloroform to the armed services? A. Yes, I do.

Q. Do you recall the rejection of that chloroform? [258] A. Yes.

Q. Now, subsequent to the rejection of that chloroform did you at any time on week ends in March of 1952 participate in the reworking, filtering or reprocessing of that chloroform? A. No, I did not.

Q. Did you do such a preparation on that chloroform or any other chloroform at any time during your employment at Private Brands? A. No.

Q. And have you ever seen anybody reprocess or refilter or rework chloroform in the year 1952 or any other year at Private Brands? A. Well, I seen it.

Q. Continue. A. Finished.

Q. After rejection? A. I say I have seen it in other years, I seen it filtering like chloroform, yes.

Q. But not in 1952? A. I don't think in 1952.

Q. Now, do you recall the date of your interview with Mr. Johnson, the FBI Agent that was on the stand? A. No, I do not.

Q. Do you recall being interviewed by an FBI Agent? A. Yes.

Q. And do you recall that he called in the summer of 1953? [259] A. I don't know when he called. I recall the interview.

Q. Now, prior to the interview with the FBI Agent did you have any discussion with Mr. Carey as to the projected interview? A. I believe I did. I am not certain. I don't know whether there was a projected interview. I believe Mr. Johnson just came up and I am not certain about whether I did or didn't.

Q. Did Mr. Carey ever give you any instructions as to what to say to the FBI Agent at the interview? A. Yes.

Q. And what were his instructions? A. Well, that the material had been reworked and that I was to participate in it.

Q. Did he tell you who else to tell the FBI Agent had participated in the reworking? A. Yes.

Q. And who were those other persons? A. Well, there was a fellow named George Waytuk, who is an employee of Private Brands, and Mr. Carpinelli.

Q. And also Mr. Carey? A. Yes.

Q. Now, Mr. Ehrlich, when Mr. Carey gave you these instructions did he give you any detailed instructions as to who was to have done each particular operation in the alleged reworking? A. I believe he said that he was going to do the filtering, he [260] was filtering, and that Mr. Carpinelli and I were capping and replacing the bottles in the boxes.

Q. Did he give you any written instructions in that respect? A. No, not at that time.

Q. And when you talked to the FBI Agent did you tell him that you had participated in the reworking of chloroform? A. Yes, I did.

Q. And did you also tell him that Mr. Carpinelli and Mr. Carey had participated in the reworking? A. I believe they asked me—if they asked me that question I would have said yes. I don't know whether he asked it at all.

Q. And was the statement that you gave to the FBI Agent that you had participated in the reworking of chloroform a false statement? A. Yes.

Q. And—that false statement which you gave to the FBI Agent, did you give the statement because Mr. Carey told you to give it?

Mr. Driscoll: I object.

The Court: I sustain the objection. You have already covered the instructions.

Q. Mr. Ehrlich, do you have any recollection of a relabeling operation on the rejected chloroform? A. Yes.

[261] Q. And do you recall participating in the relabeling operation? A. Well, I set up the job, just as any other job.

Q. Did you observe the rejected chloroform bottles being relabeled? A. Yes.

Q. And was anything done to the chloroform bottles other than the relabeling? A. No, not during the time that I saw it, no.

The Court: You mean as to the contents?

Mr. Packard: As to the contents, your Honor.

Q. And did that relabeling consist of putting labels over labels that were already on the bottle? A. Yes.

Mr. Packard: No further questions.

If your Honor please, I do have one further question.

The Court: Yes.

Q. Did you supervise the relabeling operation on the rejected chloroform bottles upon Mr. Carey's instruction? A. Technically, I supervised the whole plant. This is one operation in twenty-five. To that extent, I supervised it, yes.

The Court: Yes, but were you told to label by Carey?

The Witness: Yes. I guess that is right. Yes.

Mr. Packard: That is all, your Honor.

Mr. Driscoll: No cross-examination, your Honor.

[261A] (Witness excused.)

The Court: We will take a recess until 2 o'clock.

(Recess until 2 p. m.)

[262] AFTERNOON SESSION

Mr. Packard: Anthony Carpinelli.

ANTHONY CARPINELLI, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Packard:

Q. Where do you reside, Mr. Carpinelli? A. 122 Remsen Street, Brooklyn.

Q. And where are you employed? A. Now?

Q. Yes. A. Sage Laboratories.

Q. What is the address of Sage Laboratories? A. 300 West 69th Street.

Q. How long have you been employed there? A. It will be three weeks tomorrow.

Q. And prior to your employment at Sage Laboratories where were you employed? A. At J. L. Prescott, in Passiac, New Jersey. I had worked there for about two months.

Q. Before J. L. Prescott where were you employed? A. Contract Packaging.

Q. What is the Contract Packaging Company? A. It is a packaging concern that packages all the detergents and all.

Q. Who was your employer at Contract Packaging Company? A. Mr. Carey and Bob Ehrlich.

Q. Were they the co-owners of the Contract Packaging Company? [263] A. Yes, sir.

Q. What were your duties—I withdraw that.

How long were you employed at Contract Packaging? A. About three years and nine months.

Q. What were your duties at Contract Packaging Company at the time you left your employment there?

Mr. Driscoll: May I ask, your Honor, to fix a date?

Mr. Packard: Well, Mr. Carpinelli said that he ceased his employment there approximately three months ago and the question was at the time his employment ceased what were his duties.

Mr. Driscoll: He said he worked for contracting something or other for three years, around three years.

Q. At the time your employment ceased at Contract Packaging what were your duties? A. I was the plant foreman taking care of shipping and receiving, taking care of the men and laying out work.

Q. Did you have that position in those days during your entire period of employment at Contract Packaging Company? A. Yes.

Q. And does that include the year 1952, Mr. Carpinelli? A. Yes.

Q. Have you ever been to the office and plant of Private Brands at Clifton, New Jersey? [264] A. Yes, two or three times.

Q. Is the Contract Packaging very far from Clifton, New Jersey? A. I will say it is about 10 or 15 minute ride.

Q. Have you ever in your entire employment at Contract Packaging Company gone to the Private Brands plant and on one or more week ends participated in the reworking, filtering or processing of a quantity of chloroform? A. No.

Q. Have you ever done such an operation at any time at Private Brands? A. No.

Q. Have you ever in your visits at Private Brands seen anybody else processing, filtering, reworking chloroform? A. No.

Q. When you were interrogated by the FBI Agent on the first interrogation, did he ask you if you have ever

reworked chloroform at the Private Brands plant? A. Yes.

Q. What was your answer to him? A. I did.

Q. Was that a false statement? A. Yes.

Q. When the FBI Agent interviewed you the second time, did he ask you whether you had ever participated in the reworking of chloroform? A. Yes.

Q. And what did you reply on that occasion, Mr. Carpinelli? [265] A. Well, during the course of the talk I admitted I never worked on it then.

Q. Did anyone tell you—prior to your first interview with the FBI Agent did anyone ever tell you to state falsely that you had participated in the reworking of chloroform? A. Yes.

Q. Who told you that? A. Mr. Ehrlich.

Q. Did he tell you who had told him to tell you that? A. No.

Q. Did Mr. Ehrlich come very often to the Contract Packaging plant while you were employed there as a foreman? A. Once or twice a week.

Q. How often did Mr. Carey come to the Contract Packaging Company plant? A. Maybe once a month; maybe every two months.

Q. Was it in the course of one of these visits by Mr. Ehrlich to Contract Packaging Company that he requested you to make these false statements to the FBI? A. Yes.

Mr. Packard: No further questions, your Honor.

Cross-examination by Mr. Driscoll:

Q. Now, Mr. Carpinelli—is that right? A. Yes.

[266] Q. You never worked for Private Brands, Inc.; is that right? A. No, sir.

Q. You say you are now employed by Sage & Company? A. That is right.

Q. You were employed at the Contract Packaging Company for three years between what dates? A. January 1951 to November 1954.

Q. From January 1951 to November 1954, and you said that Contract Packaging Company was about 15 minutes ride by what—automobile? A. Probably so, yes, sir.

Q. To the Private Brands. You say you visited Private Brands plant? A. About two or three times. Maybe four times.

Q. For what purpose? A. Once to pick up the payroll and another time for looking at a machine down there. Just things like that, that is all.

Q. What was your position with the Contracting? A. I guess plant foreman, if you want to put it down that way.

Q. You stated that you testified—or, rather, you testified that you were questioned by the FBI as to whether or not you personally participated in the reworking of chloroform—we will refer to it as the chloroform contract—and what did you say, what did you tell him? A. I never worked on it. I never worked on it.

[267] Q. You told the FBI that? A. Yes.

Q. When they asked you the question first you told them yes, you did, and later on you said— A. The second time I told him no, I did not.

Q. What did you tell the FBI? A. I just want to go along with the case. I thought it was going to be—

Q. What did you say to the FBI when they asked you the question first? A. That I worked on it.

Q. You said to the FBI, yes, sure, I worked on it? A. Yes.

Q. What time was that? Can you fix the date, approximately? A. No, I can't.

Q. Was it in 1952? A. I don't know. I don't know whether it is 1952 or 1953. I don't know.

Q. Then approximately how long thereafter that first statement did an FBI man, did another or the same FBI man ask you that same question, the answer to which you say was no, contradicting the first statement? A. I will say about six months later.

Q. Six months later. You just stated two or three questions ago that I asked you that you told the FBI man the first time yes, you did, and you gave, volunteered the answer just to go along with the matter, didn't think anything of it.

Now, on direct examination didn't you say you were [268] told to say yes to the FBI? A. Yes, I was told to say I worked on it.

Q. But in answer to my question you said that you just wanted to go along with something or other and the next time, six months later, you changed your mind and said no?

Mr. Packard: I object on the ground that the question is argumentative.

The Court: I sustain the objection.

Q. Do you know what reworking is? A. Yes.

Q. Did you ever see it done? A. Yes.

Q. Did you ever do it yourself? A. On what, now?

Q. Did you ever do it yourself? A. On what?

Q. Well, did you ever rework chloroform? A. No.

Q. What did you rework? A. I don't recall offhand, but there was something I did rework one time, but it was nothing to do with the Government or anything.

Q. Was it in your own business? A. Down at the other plant, yes. I don't know what it was. Contract Packaging.

Q. Down at Contract Packaging? A. Yes. I don't know what it was now.

Q. You did participate in reworking something? A. Yes.

Q. Is that proper? A. What is that?

Anthony Carpinelli—for Government—Cross

Q. Is it legal for you—I will withdraw that question.

[269] Q. When you on this occasion that you can recollect, that Contract Packaging participated in reworking a contract, was it in the usual course of business?

The Court: I sustain the objection.

Q. What kind of work did Contract Packaging Company do? A. Detergents, mixing foot powders—things like that—or powder work.

Q. Do they have contracts with the Government? A. They did have one year.

Q. But this one time while employed with Contract Packaging Company you participated in a rework?

The Court: I have already sustained an objection to the question.

Mr. Driscoll: To that particular question, your Honor?

The Court: It does not make any difference what he did in another plant. The sole question is what was done or what did he say to the FBI about the defendant's plant in reworking any material there involving chloroform, and to go beyond that, except credibility, is not permissible.

Mr. Driscoll: That is just exactly what I am attempting.

The Court: I am not going to let you go into that.

Mr. Driscoll: All right.

[270] The Court: I wish you could speed up this cross-examination. There is too much time lost looking over your notes.

Mr. Driscoll: Unfortunately, your Honor, they are not all my notes, if I may explain to you.

Anthony Carpinelli—for Government—Cross

Q. In your employ, you were employed, you said, by Robert Ehrlich? A. And Mr. Carey.

Q. And Mr. Carey. How often did Mr. Carey visit this plant that you worked in? A. Maybe once a month. Maybe once every two months.

Q. Did you know Mr. Carey to talk with him? A. Yes.

Q. Did Mr. Carey give you instructions and directions in the Contracting Corporation or Contracting Packaging Company for the kind of work to do and what not to do? A. At times.

Q. Mr. Carey did? A. Yes.

Q. Not Mr. Ehrlich? A. Mr. Ehrlich did, too.

Q. Was Mr. Ehrlich there all the time? A. Once or twice a week he used to come down.

Q. Mr. Ehrlich was there once a week or twice a week, and Mr. Carey was there— A. Maybe just once a month, to look the place over, that is about all.

Q. And you ran the place yourself? [271] A. That is right.

Q. You were subpoenaed to testify by the Government. You were subpoenaed by the Government to testify before the Grand Jury, were you? A. Yes.

Q. Did you appear before the Grand Jury and testify? A. Yes.

Q. Were you told by anybody how to testify before the Grand Jury? A. No.

Q. Did Mr. Packard, the D. A., the Federal D. A. who subpoenaed you to appear before the Grand Jury, he didn't tell you what he wanted you to say or else? A. No. Just to tell the truth, that is all.

Q. Did he or did he not—I will withdraw that quesiton. Did you after your appearance before the Grand Jury and testifying before the said Grand Jury ever tell anybody that you were told to testify that you never worked on chloroform or else? A. No.

Q. You never said that to anybody? A. Not before the Grand Jury.

Anthony Carpinelli—for Government—Cross

Q. What was that? A. Not when I was subpoenaed before the Grand Jury.

Q. Well, were you ever told—did you ever tell anybody [272] that you were told by Mr. Packard, the Federal D. A., to testify that way before anybody? A. No, not that I recall.

Q. Well, then, why do you say that when your answer to that previous question was no? A. What question was that again?

Mr. Driscoll: Mr. Reporter, will you read the question prior thereto?

(Question read by the reporter as requested.)

Q. You qualified your answer by saying no, you never did say—

Mr. Packard: I object to that question, your Honor.

The Court: I sustain the objection.

Mr. Driscoll: If your Honor please, the purpose of this is credibility of this witness.

The Court: You repeat things and you get answers and then you argue with the witness, and all of that is objectionable.

Go ahead with your interrogation.

Q. Mr. Carpinelli, did you ever hear of Alamo Laboratories? A. Yes.

Q. Who was the owner of that? A. Mr. Yager, I think. That is what I always understood, anyway.

Q. Were you ever or did you ever receive or take an [273] account, money from an account at that plant? A. What account?

Mr. Packard: I object, your Honor.

The Court: I didn't hear the question at all.

What is the question? Will you state it, Mr. Driscoll?

Mr. Driscoll: The question is, did you ever take money from an account at the plant referred to: Alamo Laboratories, owned by a Mr. Yager?

The Court: I sustain the objection. If you want to ask whether he was ever convicted of a crime, you can ask him that, but you cannot put a question such as you just put.

Q. Did you ever in the course of your employ at Contract Packaging have contacts that had anything to do with Government inspectors of contracts? A. Yes, when they come down to inspect Government work.

Q. And you took the inspector around to show him what was wanted, what he wanted? A. It was I or Mr. Carey that took the Inspector around.

Q. After you had testified before the Grand Jury did you phone Mr. Ehrlich, Mr. Bob Ehrlich? A. No. The second time Mr. Bob Ehrlich was up there the same day.

[274] Q. I did not ask you that. I asked you did you phone Mr. Bob Ehrlich? A. I didn't phone because he was there the same day that I was there. So there was no need to phone him.

Q. Your answer is no, you didn't? A. No.

Q. Well, you were interviewed by Mr. Packard once or twice? A. Yes.

Q. After that interview with Mr. Packard in his office did you ever call—did you call Bob Ehrlich?

Mr. Packard: I object, your Honor, unless the time—

The Court: Sustained.

Q. Do you remember the time of your second interview with Mr. Packard? A. I think I do, yes. What is it?

Q. After that second interview that you remember, did you thereafter phone Mr. Ehrlich? A. Yes.

Q. What did you say to him?

Motion to Dismiss Indictments

Mr. Packard: I object, your Honor.

The Court: Sustained.

Q. Did you tell him that Mr. Packard had told you to testify about rework, that you had reworked?

[275] Mr. Packard: I make the same objection, your Honor.

The Court: Sustained.

Mr. Driscoll: That is all, your Honor. Thank you.

Mr. Packard: No further questions.

(Witness excused.)

Mr. Packard: If your Honor please, the Government rests.

The Court: The Government rests.

Proceed, Mr. Driscoll.

Mr. Driscoll: If your Honor please, at this time, the Government having rested, I would like to make a motion that the indictments be dismissed on the ground that the Government, having completed its testimony, has failed to prove a violation of Title 18, United States Code, Section 1001 in that it has failed to prove beyond doubt that the defendants, either together or individually, made a false statement or writing knowing that the same was false, fictitious or a fraudulent statement or entry, with the intent to deceive the Government and obtain something to which they were not entitled.

[276] The Court: The motion is denied.

Mr. Driscoll: Exception.

Mr. Robert Ehrlich.

Robert Ehrlich—for Defendants—Direct

ROBERT EHRLICH, called as a witness on behalf of the defendants, having been previously sworn, testified as follows:

Direct examination by Mr. Driscoll:

Q. Mr. Ehrlich, when did you first meet Francis P. Carey, one of the defendants in this case? A. We were both employed by the same company. I think it was in 1942.

Q. Was it 1943? A. 1942 or 1943. I don't remember.

Q. Now, when was it that you went to work for Private Brands, Inc? A. April of 1950.

Q. And in 1952, the year 1952, you were not employed by Private Brands, Inc. as a chemist, were you? A. No. I am not a chemist.

Q. What were you— A. I am not a chemist.

Q. What were you employed as? A. Well, I started as assistant production manager and I think [277] by 1952 I became production manager.

Q. Tell me, as briefly as you can, what your duties were as production manager in Private Brands, Inc., and tell me, briefly, the type of business they did—that is, what it contemplates is what I mean. Was it strictly chemical contracts or what? A. Well, Private Brands is in the contract packaging business and as such they don't sell products under their own name for packaging or manufacture, or both, on products for outside concerns who for one reason or other prefer to have companies like ours perform those functions against doing it themselves, and it is not limited to drugs and chemicals.

There is practically no limit to the variety of merchandise that we have packaged down through the years. Anything that girls can do on an assembly belt that we have sufficient room to take in and that we can make money on becomes our business, and my duties as production manager

are when the contracts, when the sale department has secured a contract, to look over the contract and the specifications and the delivery dates and so on and so forth, and set up the time, the machinery, the space, the girls, the stencils—just everything that has to do with the production down through shipment.

Once I deliver to the shipping department I am no [278] longer interested.

Q. Now, in the plant of Private Brands, Inc. you are familiar with these Government contracts for the chloroform that have been discussed in this case? A. I have become familiar with them, yes.

Q. You know there were in the plant other contracts that were awarded to the PBI? A. Yes.

Q. What percentage of the plant operation was used for these contracts for chloroform? Did they use the whole plant to do it? A. No. At the time we were producing or packaging this chloroform we probably used 2 per cent of our total floor space.

Q. And you just mentioned as part of your duties as production manager you were handed a contract by your employer which was to be fulfilled and you set everything up and you followed it through until it was turned over to the shipping department to see that the contract was terminated? A. Yes.

Q. I show you a document entitled "Chloroform, 1 lb. Stock No. N1-139-000."

Are you familiar with this? A. Not too familiar. I have seen this sheet at one time or another I believe when we started, when I started to set [279] up for the contract that we are talking about.

Q. Well, all right then, suppose you tell us what you do know about the document. A. Well, this paper contains a bill of materials—that is, it shows each item that goes into producing the final, the finished material, whatever it might be.

In this case it was chloroform which was produced in February of 1949 and shows the item such as a 12-ounce bottle.

Mr. Packard: Your Honor, I don't believe that this item is in evidence.

The Court: No, it is not.

Mr. Driscoll: I offer this document in evidence as a defendants' exhibit.

Mr. Packard: The date on this, your Honor, is February 3, 1949, and I am going to object on the ground that it is irrelevant.

The Court: Sustained.

Mr. Driscoll: If your Honor pleases, this is a contract with the Government which was referred to and as I recollect the contract that that refers to was put in evidence by the Government in this case.

The Court: Where is it?

Q. You have looked at this, Mr. Ehrlich? [280] A. Yes.

Q. Will you describe what it is?

Mr. Packard: I object, your Honor.

The Court: He has already indicated in general terms what it is.

Mr. Driscoll: All right, your Honor.

Q. Is this or is it not a standard form used and was used in the 1949 contract, the 1952 contracts that are part of this case? A. The same information is contained on a standard directive that is made out, yes. Not necessarily in that particular form but the same information.

Q. The same information? A. Yes.

Q. It is a guide-sheet, is that what you mean? A. That is right, it is a guide sheet for our various department that are concerned.

Q. For the manufacture of chloroform direct? A. Yes.

Q. And it would be used in the 1949 contract that is referred to and the 1952 contract?

Mr. Packard: Your Honor, I object on the ground that defense counsel is leading the witness.

The Court: I sustain the objection.

Q. Mr. Ehrlich, you were plant manager in Private Brands, [281] Inc. 1949 when they had a contract with the Government? A. No, I was not there at that time.

Q. What were you?

The Court: He says he doesn't know.

The Witness: I said I was not there at that time.

Mr. Driscoll: He was not there.

Q. In 1952, you were assistant plant manager of Private Brands, Inc.? A. Yes.

Q. When these contracts were awarded to them from the Government? A. Yes, sir.

Q. Was that procedure or form, whatever you designate it, used in the fulfillment of that contract? A. Yes, there was one similar to it used. As I say, not necessarily that form but containing the same information.

Q. Can you tell me, in your own words, how that was used in fulfilling the contract in 1952 between the Government and Private Brands, Inc.? A. Well—

The Court: I sustain the objection. He didn't say that it was used. He said something similar. If you produce the something similar, then we will know where we are at.

Q. All right. Mr. Ehrlich, what was used in the carrying out—when you were in charge of production—in carry-

ing out this contract in 1952 which Private Brands, Inc. had [282] with the Government? What was used?

Mr. Packard: I object to the question, your Honor, on the ground that it is vague and indefinite.

The Court: Well, I think Mr. Driscoll is seeking to ascertain from the witness what method was employed on the production line in carrying out the 1952 contract with the Government. If that is the question, the witness may answer it.

Mr. Driscoll: That is the question, your Honor.

A. Well, the form that is made out is a combination of bills of materials and directives. The bill of materials is used by the production department so that the correct materials are brought up.

We have so many different customers that it is difficult to distinguish just which bill is for which customer. So they make out a very detailed bill of materials so that the men in shipping and warehouse can move the proper space to the production floor; and a copy of that directive also goes to our supervising floorlady and our table floorman so they can check that the proper materials are being used at all times. That is one item of the directive.

In addition to that, there is a directive as to the maintenance department, as to the machines to be used, [283] how they are to be set up, a small sketch to them, and there is a directive to our supervising floorlady as to the girls to be used and which operations on the production line those girls shall perform.

It is a rather detailed sheet.

Q. Mr. Ehrlich, if I show you this

The Court: Is this what you have already shown him?

Mr. Driscoll: Yes, and I want to ask him this question, your Honor:

Q. These directives and this procedure that you just answered, is that practically what was done? Does that refresh your recollection as to your procedure?

The Court: He doesn't need the refreshment of recollection. He has already told you what they did in 1952, and he was not there in 1949.

Mr. Driscoll: No, I just mean in reference to 1952. Unfortunately, this is dated 1949.

The Court: Well, then, we better get the record of 1952.

Q. Now, you told us everything that is done, the procedures that are taken when you get a contract of this sort —when you got this contract, let us be definite, the contract handed to you by your employer referred to in this [284] suit of 1952—you have now told us what you immediately started to do and set up. A. Yes, that is my part of it. The materials must be purchased by the purchasing people and the proper specifications carried out in those purchases, but that I don't do.

Q. Well, do you tell the purchasing department in your company? A. No, Mr. Carey does that. I have nothing to do with purchasing.

Q. In other words, you wait until the purchasing department and the combination of your corporation buys the materials and turns them over to you, then you set it up? A. That is right. They place their orders and let me know when the supplies are expected so that I can promptly schedule the work to be run at the time it is supposed to begin.

Q. Are you familiar with a contract between the Government and Private Brands, Inc. for $CHCl_3$ in February, 1952? A. Is that chloroform? Is that CH—is that chloroform?

Q. Yes, $CHCl_3$. A. Yes, I am familiar with it.

Q. How did you learn about it? How did it come to your attention? A. I am sorry, maybe I misunderstood. Are we talking about [285] the same choloroform contract? How did I find out about it originally that we had a contract or what?

Q. That is right. In February, 1952, how did you find out that your boss, your employer had been awarded a contract and you were going to manufacture something or do something for the Government? A. I might have been told by any number of people in the office. I would have known our company got the contract because I probably would have done some work on estimating labor on it.

Originally the word might have come from whoever opened the mail.

Q. All right. Then what did you do when you learned about it? What did you do about this contract and when, if you remember? A. Well—

Q. Give it to me in your own words, Mr. Ehrlich. A. As far as I can recall—and I can't quote this particular contract—but what I would normally do in any contract was first to determine the delivery date.

Mr. Packard: If your Honor please—

The Court: Strike out the answer as not responsive.

Mr. Ehrlich, you have got to limit yourself to the question. You were asked about the contract that [286] Private Brands made with the United States Government in respect to chloroform. We don't care about anything else.

Q. Mr. Ehrlich, I show you Government's Exhibit No. 5 in evidence. Look at it.

Now, I ask you were you in February, some time in February, if you can tell me exactly when you were given that contract and told that your employer, Private Brands,

Inc. had this contract and you were going to fulfill the contract? A. Yes, I have seen this and I was told that this was a contract that we had been awarded and that I would have to make plans to fulfill it.

Q. All right, than what did you do, succinctly, as I think his Honor said, in as few words as possible? A. I looked at the delivery date and decided that it would have to be set up in such and such a time in advance to fulfill the contract as per schedule.

I decided the type of equipment to be used and which particular pieces of equipment were to be used. I decided which girls were to be used on which operations and ascertained from the purchasing department the reference of materials which would enable me to produce on the date I had set up.

[287] I made the directive out, which in turn was sent to the warehouse and maintenance department and in our own supervisory limit.

When the scheduled date of contract, the scheduled date to produce chloroform arrived I spent a good deal of time the first day—I spent a good deal of time with the contract the first day to ascertain that everything was going in accordance with the directive, to make sure there were no hitches or problems connected with the producing of the chloroform that could not be solved by our own supervisors, by our plant supervisors.

Q. Tell me, in the contract that you have before you and which you say you read, is there anything prohibiting two labels on a bottle?

Mr. Packard: I object, your Honor, on the ground—

The Court: Sustained.

Q. Did you have charge of—was it part of the procedure from the original contract handed up to you ending

with your shipping department, while it is in your direction is the labeling done? A. Yes, that is part of my operation.

Q. Did you know that there were two labels, as testified to by the Government, two labels on the bottle? A. I knew very well. had them put on.

[288] Q. In the course of your employment—I will withdraw that.

Who put the labels on, the double label or that second label? A. I can't tell you the names of the girls. The labeling machine operator.

Q. That is all right. Some girls. Did you tell them to put them on? A. Well, as I say, I set up the job, just as any other job, and that was a job to be done. To that extent I told them to do it. I didn't go directly to them and say you do thus and so. I told my floorlady and delivered the directive to relabel these bottles.

Q. And those bottles that were relabeled, as you term it, had they been relabeled? A. I don't know.

Q. Well, tell me why they were relabeled?

Mr. Packard: I object, your Honor.

The Court: Tell you why what? What is your question?

Mr. Driscoll: Why, they were relabeled.

The Court: Well, if he knows.

Mr. Driscoll: If he knows, naturally.

A. Yes. I was told that the stock number was incorrect.

[289] The Court: You were told what?

The Witness: The stock number on the label that had previously been applied to it was incorrect, that the purchasing department had made an error and it must be relabeled.

The Court: Who told you that?

The Witness: I think it was Mr. Carey, but it might have been a girl that we had in the purchasing

department who is no longer there. There was an error made in the purchasing of the labels, they were not according to specification, and as such they were not proper for the bottles but they had already been labeled.

Q. In other words, the labels that wer on them, the lower label had been improperly purchased or purchased and improperly stamped? A. Improperly purchased.

Mr. Packard: I object to that question as characterization of the testimony.

The Court: I have not heard the question yet.

Mr. Packard: I heard the answer, your Honor.

The Court: Do you always object in the middle of a question if the answer is given?

Mr. Packard: I beg your pardon. I do think Mr. [290] Driscoll had finished his question.

The Court: Now, when you got that contract before you, did it call for double labeling at the outset?

The Witness: Well, no. No.

The Court: And you went ahead and manufactured and you made the shipment?

The Witness: No, I don't know there was a shipment made at that time.

The Court: When was the shipment made?

The Witness: When we had to relabel the lot of bottles and some time after that the shipment was made.

The Court: And how long after you saw the contract the first time did you relabel it?

The Witness: I am sorry, I can't answer that. I don't know.

The Court: All right, go ahead, Mr. Driscoll.

Mr. Driscoll: I am trying to do this as fast as I can. Unfortunately, I was talking to my client and don't know—could you quickly read to me, Mr. Reporter, what the Judge said?

(The record was thereupon read by the reporter.)

Mr. Driscoll: Thank you very much.

Q. Mr. Ehrlich, this relabeling, when was that done—after rejection or not?

[291] Mr. Packard: I object, your Honor, because he is leading the witness.

The Court: I will overrule the objection.

You have got to make some progress here. You seem to be spending an immense amount of time between questions and then there is difficulty on the part of the witness to understand the question, difficulty of the Court to understand what the question is directed to.

I don't wonder you object, but nevertheless we have got to get along here somehow.

Did ~~you know~~ anything about a rejection?

The Witness: Yes, I know there was a rejection.

The Court: Well, now, the question is, was the relabeling after you got notice of the rejection or before?

The Witness: After.

~~The Court: All right.~~

Q. And did you then check this pamphlet that is referred to U. M. 186 on the question of relabeling? A. Mr. Carey and I went over the U. M. 186 in connection with the relabeling. We did.

Q. And after doing that, was that before the relabeling? A. Yes.

The Court: Did you use the same bottles as had [292] borne the original label?

The Witness: Yes.

The Court: The contents were the same?

The Witness: Yes.

Q. The bottle was not open. And the reason—what was the purpose of relabel? Why did you relabel it? I think you testified before— A. Because the label was rejected by the Government. That is what I was given to understand.

Q. The Government had rejected this because of the labeling that was wrong in some respect? A. Yes.

Mr. Packard: Your Honor, I object to this question.

The Court: Well, do you mean that the witness was told that that was the Government's reason for rejection?

Mr. Driscoll: Yes, your Honor, the reason.

The Court: I just want to get the meaning of your question.

Mr. Driscoll: Yes. The meaning of my question is, weren't you given the rejection received by your employer from the Government, and one of the reasons for the rejection was as he has testified, and therefore he put the right label on.

[293] The Court: You didn't say one of the reasons. You said the reason.

Mr. Driscoll: There were six or seven rejections put in evidence.

The Court: There were five deviations listed by the Government.

Mr. Driscoll: That is right.

The Court: In a notice of rejection, and your question was limited to the matter of labeling.

Mr. Driscoll: And that was the first thing mentioned on the rejection notice.

The Court: You didn't say anything to the witness about a rejection notice, and I am not sure that he—you can ask him whether he saw the rejection notice.

Q. Did your employer show you the Government's rejection notice? A. I do not recall. I don't believe so. He told me that the material had been rejected.

Q. Did he tell you why? A. Because of this label.

The Court: He didn't mention the other reasons?

The Witness: No.

Q. And in that pamphlet U. M. 186 there is nothing therein which forbids or says you may not relabel?

[294] The Court: Now, we have gone over that.

Q. Did outside laboratories or client laboratories—do you know whether or not Private Brands have had tests of their material by outside laboratories? A. Yes, we do have tests by outside laboratories.

Q. Is it often, frequent, or seldom? A. Every day in the week.

Q. In such sending out of a contract, one of your contracts to an outside chemistry firm or company for a test when you received that laboratory rejection or laboratory report what did you do?

The Court: He didn't say that he got the laboratory report. What he said was that the defendant Carey told him about the label that would have to be changed. The witness has not testified that he saw the laboratory report.

Q. Did Mr. Carey or Private Brands, Inc., your employer, tell you what those reports contained? A. The rejection report?

Q. Any report, rejections and other reports. A. I see the reports that refer to my job. I don't see the reports that don't refer to my job.

The Court: Didn't you tell me you did not see the rejection report or which of the—

[295] The Witness: I am sorry, your Honor. I thought Mr. Driscoll was talking about any reports. Yes, I see some.

The Court: Is that connected to this contract?

The Witness: As far as I recall, I did not see this rejection of the chloroform there. I was told that it was rejected and the reason given was the labels.

Q. You didn't see it; you were just told by Mr. Carey? A. Yes.

Q. Did he tell you that it was rejected—you have already testified labeling—did he tell you any of the other, as it is termed, deviations? A. No.

Q. He said nothing more than the one deviation on the rejection report of labeling; is that right? A. Yes.

Q. You testified, as I recollect it, that daily Private Brands, Inc. sends out samples of its products to outside independent chemists and firms for analytical analysis? A. Right.

Q. Or for analysis? A. Right.

Q. And then the reports come back. You get those, don't you? A. Sometimes I get them or I get a copy of them.

[296] Q. You either get an original or a copy of those analyses? A. Yes.

Q. Are the rejections—the way the question is worded—are rejections only of what percentage of the total is rejected?

Mr. Packard: I object to that.

The Court: Sustained.

Q. Keeping to the subject we are discussing, with interruptions, are rejections ever received on these samples so submitted to outside chemists? A. Yes, sir.

Mr. Packard: I have to object again, your Honor.

The Court: Sustained.

Mr. Driscoll: Might I ask your Honor why the objection?

The Court: Because the question calls for immaterial and irrelevant matter. We have to deal with this contract.

Mr. Driscoll: That is all, your Honor.

The Court: Any cross-examination?

Mr. Packard: No cross, your Honor.

The Court: That is all. Thank you.

(Witness excused.)

Mr. Driscoll: If your Honor pleases, from conversations as to what the possibilities were in this case and [297] how long and how many witnesses I made apparently a false deduction and expected that the Government would not finish its case until the termination of today.

I then discovered that suddenly this noontime that there were only going to be one or two witnesses brought in. I had no idea how long. I am not prepared to put on my next witness because I told my witness not to be here until 10:30 in the morning.

The Court: Now, Mr. Driscoll, when I had counsel approach the Bench yesterday I asked Mr.

Packard when he was going to finish and he thought the Government's case would be concluded in this morning's session, so that you had knowledge of when he was going to conclude.

Mr. Driscoll: That is right, he said he had five witnesses and that he expected he could do it in the morning session.

I discussed at the luncheon recess with Mr. Packard the fact as to how long and how many witnesses, and he said, well, I have two more witnesses, I won't be long; I don't know how long you will be on cross-examination. So I didn't think that he would be finished by 2:30 or three o'clock.

The Court: Well, he was.

Mr. Driscoll: That is why I immediately had—

[298] The Court: Have you no witnesses in the courtroom?

Mr. Driscoll: No, none for me, none of my witnesses, and Mr. Packard said to me if you are caught short at three or three-thirty or something like that, I will not oppose if you ask the Court for leeway that you can start your case tomorrow morning.

The Court: How much longer are you going to take?

Mr. Driscoll: I hope it will be no longer than one day, but I have seven witnesses.

The Court: You will have to question a little more rapidly. I will grant your request.

We will recess to 10:30 tomorrow morning. Don't discuss the case.

Mr. Driscoll: Thank you very much, your Honor.

(Adjourned to February 3, 1955, at 10:30 o'clock a. m.)

[299] Brooklyn, New York,
February 3, 1955.

Appearances:

(As heretofore noted.)

TRIAL CONTINUED

Mr. Driscoll: Colonel Cummings.

SAMUEL M. CUMMINGS, called as a witness on behalf of the defendants, having first been duly sworn, testified as follows:

Direct examination by Mr. Driscoll:

Q. Now, Colonel Cummings, would you tell the Court and jury your present occupation? A. I am president of the Pylan Products Company. We manufacture certified colors, but the layman calls them dyes.

Q. Prior to your present occupation, what was your occupation? A. Well, from 1941 until 1946 I was with the United States Army Chemical Warfare Service. I entered in 1941 in the grade of captain and in 1945 I was a full colonel.

[300] In 1918, I was with the infantry and ended up with the Chemical Warfare Service.

Q. Now while with the Chemical Warfare Service, known as CWS, were you in the Procurement Division? A. Yes, but my initial assignment was with Intelligence in the Procurement Division. My second job was the purchase and production of all chemicals.

Q. Do you know the defendant, Mr. Carey, Francis P. Carey? A. Yes, I do.

Samuel M. Cummings—for Defendants—Direct.

Q. Have you either directly or indirectly at any time been instrumental in having Government contracts while you were with the Government awarded to Mr. Carey or to Private Brands, Inc.? A. I was not. Mr. Carey during the war was employed by another company who was manufacturing for the Chemical Warfare Service.

Q. You had nothing to do with any awarding in your position in the purchasing or procurement agency with CWS? A. Not to Mr. Carey but to the company by whom he was employed.

Q. Now, the Chemical Warfare or CWS, Chemical Warfare Service and its successor as I believe was the Chemical Corps, they had some very confidential and restricted work. Is that not right? A. Yes.

[301] Q. Do you know whether or not Mr. Carey was considered or do you consider him—I will withdraw that question.

In order that any contractor do business with CWS, was it not necessary that he be well thought of?

Mr. Packard: I object.
The Court: Sustained.

Q. Do you know whether or not Mr. Carey was in charge of production on M-9? A. He was.

Mr. Packard: I object, your Honor, on the ground that it is irrelevant to the issues.
The Court: Well, so far it is.

Q. Is that not a restricted item? A. It was a confidential item.

Mr. Packard: I object again, your Honor.
The Court: I sustain the objection.
Mr. Driscoll: If your Honor please, my purpose in asking the question is to show that the defendant

here on trial, Mr. Carey, was of such a character, moral as well as otherwise, as to be trusted—

The Court: Now, Mr. Driscoll, if the witness has been called as a character witness there are certain prescribed questions that should be put and you may, if you care to ask those questions.

Mr. Driscoll: I will do it that way—ask him as [302] a character witness and ask him as a witness for other purposes.

Q. You say you have known Mr. Carey for how long? A. Since 19—I would say 1942.

Q. Did you know him very well? A. Well, I know that we had a report on Mr. Carey, this being a confidential item.

Mr. Packard: If your Honor please, I move to strike this answer out.

The Court: Strike it.

The Witness: Well, let me say this then: After the war I met Mr. Carey on many occasions and got to know him quite well and arrived at an opinion as to his character and as to his responsibility.

Q. What is your opinion of his character?

Mr. Packard: I object to the form of the question.

The Court: Certainly. That is not the way in which to develop an answer to his character.

What you want to develop is, first, the witness says he knows the defendants. Now, the next question is whether he knows other people who know him. And the third question is whether he discussed this man's reputation as to integrity and so on; and finally, if he has, what do these people say about him.

[303] Mr. Driscoll: That is right, your Honor, and he mentioned reports by other people to him.

Samuel M. Cummings—for Defendants—Direct

Q. Have you discussed—don't use the word investigation—have you discussed with other people the type of man that Mr. Carey is, Francis Carey is? A. Yes, I have.

Q. Have you discussed it with many people? A. With several people and in matters that were extremely vital.

The Court: Strike out that part of the answer. Just make your answer responsive, Mr. Witness.

The Witness: Thank you.

Q. You have met him socially? A. Once or twice.

Q. Have you discussed with other people who are freinds or acquaintances of Mr. Carey, who knew him socially and in a business way and business dealings—have you discussed Mr. Carey? A. More in a business way.

Q. More in a business way? A. And on occasion socially.

Q. What was their opinion? A. Very good.

Q. As a result of your own experience with Mr. Carey [304] and as a result of discussing Mr. Carey with several other people as to his character and reputation, what in your opinion is the character and reputation of Mr. Carey?

Mr. Packard: I object to the form of the question.

The Court: Well, the question is very bad as to form, but the witness should be asked what his reputation is among those who know him and with whom the witness had discussed his character as to honesty.

Now, if you want to put a question similar to that, you may.

Q. The question that his Honor just mentioned. A. My answer is his reputation is good.

Q. Now, Colonel Cummings, in your services while you were in the CWS you had extensive experience in handling contracting or agency relations, did you not? A. I did.

Q. Now, could you, briefly and as succinctly as possible, explain so the jury will understand what contractor-agency relationship means?

Mr. Packard: I object, your Honor, on the ground that the question is irrelevant.

The Court: Sustained.

Q. Well, what was your work—what did your work consist of in the CWS?

[305] Mr. Packard: I object again, your Honor.

The Court: Sustained.

Q. In your work in the CWS did you discuss Government contracts with corporations or individuals?

Mr. Packard: I make the same objection, your Honor.

The Court: The same ruling.

Q. I show you two papers, one dated May 21, 1953, the other dated May 12, 1953, and ask you to look at them. A. (Witness examines papers.)

Mr. Driscoll: I would like to have these marked a defendants' exhibit for identification.

The Clerk: Defendants' Exhibit C for identification.

(Papers referred to are marked Defendants' Exhibit C for identification.)

Mr. Driscoll: That is all, Colonel.

(Witness excused.)

Philip Nossal—for Defendants—Direct

Mr. Driscoll: Will your Honor bear with me?

(Mr. Driscoll confers with Mr. Carey.)

Mr. Driscoll: I would like to recall the colonel. I am sorry.

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[306] Samuel M. Cummings, recalled.

By Mr. Driscoll:

Q. Those two letters I just showed you, Colonel, in your experience in the position with Chemical Warfare Service had you ever seen such procedure?

Mr. Packard: I object, your Honor.

The Court: Sustained.

Mr. Driscoll: That is all, Colonel.

(Witness excused.)

Mr. Driscoll: Mr. Nossal.

Philip Nossal, called as a witness on behalf of the defendants, having first been duly sworn, testified as follows:

Direct examination by Mr. Driscoll:

Q. By whom are you employed, Mr. Nossal? A. Ferdinand Gutmann & Company, Brooklyn.

Q. Has Gutmann & Company done business with the Private Brands, Inc.? A. Yes.

Q. Has the amount of purchases by Private Brands, Inc. from your company been extensive or large or small? A. No. Small.

Q. Have you ever met Mr. Carey before? A. I did.

Q. And how did you meet him? [307] A. I believe the first time—I remember the first time I met him was in connection with work that he did for one of our prominent customers. I came over to his plant.

Q. Would you say, then, that your relationship with him has been on a business basis solely and exclusively? A. Yes, that is right.

Q. Now, the Gutmann Company hold patent rights on a certain type of enclosure. A. That is correct. A method patent.

Q. Now, who in the purchasing from you by Private Brands, Inc., who in the company contacted you for such purchases, if you know? A. I would say Mr. Carey probably. It came on the telephone as a rule. I think all the purchases came over on the phone.

Q. Now, when you sold to Private Brands, Inc. these—shall we use the term sealable enclosures? Is that the way you would describe your article? A. Our trade name is Filmaco.

Q. All right. Will you tell the jury what Private Brands, Inc. brought from Gutmann & Company, what it was? A. Well, we manufacture a metal closure and as an adjunct to that closure there is an inner seal supplied with the metal closure which you usually will find in many different shops. Some of them are. Some of them are furnished elsewhere, [308] outside of the cap, for use with caps that we don't manufacture.

And that, in essence, is the item.

Q. Have you ever shipped to Private Brands, Inc. the sealable enclosures that you just described? A. Yes.

Q. Which you had purchased from other firms? A. I didn't get that. No. I think you misunderstood me. We manufacture metal caps with this Filmaco seal. We also supplied those inner seals separately at times without the cap for use with caps the customer himself supplies.

Q. So that Mr. Carey has brought this type of article from you? A. Correct.

Q. Several times and is familiar with what it is used for? A. Right.

Q. What it is used with? A. Yes.

Q. When the Private Brands, Inc. contacted you and your company for the purchase of these sealable enclosures, did he inform you, tell you what he wanted to use them for to enclose?

Mr. Packard: I object, your Honor, on the ground that it is hearsay.

The Court: Well, it is objectionable in a number of ways, but it may be preliminary to something, so I will allow it.

[309] A. With respect to a specific purchase, which I could only identify if I had the papers, I was informed as to what it is to be used for, it was necessary at that time that the purchaser that I have in mind to have that knowledge because of existing War Production Board regulations, which restricted the use of a component of that particular enclosure—the tinfoil.

Q. Now, Mr. Nossal, you are familiar with bottles, shapes of bottles? A. Yes.

Q. You are familiar with bottles that chloroform would be packed in, shipped in and enclosed in? A. And specifically, I think, they are the same bottles used for other medicinal liquids.

Mr. Driscoll: If your Honor please, I would like Mr. Nossal to draw. Do we have a blackboard or something? I want him to give for the jury a picture of a bottle and how this enclosure is put on and how it is done and what the enclosure is in, so they can understand just what he is talking about, about this patented type of closure cap and what happens to it when it is put on.

Or, if your Honor pleases, if you think it isn't necessary I can have him describe it in words.

The Court: Well, it certainly is not necessary.

[310] Q. All right. Mr. Nossal, would you, as briefly and in as simple language as possible so the jury will understand, describe in words your article, this cap and adhesive sealable enclosure, I think you call it, what it looks like, how it is put on the top of the bottle properly and how it should be put on a top of a bottle to be properly, to properly seal the contents of the bottle? A. If you wish, I will be very glad to do that.

Mr. Packard: I object to the question unless it is somehow related to the evidence in this case.

The Court: I sustain the objection.

Q. Mr. Nossal, you know, don't you, that the Private Brands, Inc. when they purchase these sealable enclosures from you you were notified that they were using them as an enclosure for choloform in bottles pursuant to a Government contract?

Mr. Packard: I object, your Honor.

The Court: I sustain the objection.

Q. Well, Mr. Nossal, you have been in business for how long? A. About twenty-five years.

Q. So you know—I withdraw that.

You have applied this closure seal unquestionably on a number of bottles, have you not? A. I have.

[311] Q. Many, many numbers of times? A. Well, not in a production manner.

Q. So that you could be properly called an expert on this type of enclosure? A. I would say so.

Q. Now, as an expert, if I were to tell you or ask you, if I used that, a man using your enclosure on a bottle, the

contents of which were chloroform, and that enclosure was applied to the bottles and those bottles were sold under a Government contract to the Government, as an expert I want you to tell me this: If those were the facts, would that sealable enclosure or the adhesive in that sealable enclosure, would it be possible for that to come in contact with the contents of the bottle that it enclosed?

Mr. Packard: I object, your Honor, both as to form and—

The Court: I will not allow it.

Mr. Driscoll: If your Honor please, the Government has put in exhibits and I put in testimony that the Private Brands bought from Gutmann & Company these enclosures, that they were put on the bottles, that the bottles contained chloroform and were sold to the Government.

That is the testimony so far and that is the testimony [312] on which I gave him this hypothetical question.

The Court: Of course, everybody concedes that that is what the Government has proved and has proved through its witnesses what has been termed gross deviation from the contract, which consists first in labeling; second, in the presence of white flaky particles; thirdly, a deviation in respect to specific gravity; fourth, in respect to carbonizing; and fifth, that the contents had an odor of kerosene smell.

Now, how is your question related to any of those?

Mr. Driscoll: It is a forerunner of testimony to explain the cause of the deviation complained of by the Government in the contents.

Would it be possible for the adhesive, which is not chloroform, for this patented enclosure for it to

come in contact first of all with the chloroform, and that is all. Mr. Nossal is not a chemist and therefore I have put in testimony to explain if that is so would that adhesive, if one minute particle came in contact with the content, would that not cause—

The Court: Then you have got to prove that there was adhesive in the bottles that were delivered to the Government.

Mr. Driscoll: It is in evidence by the Government.

[313] The Court: The adhesive is!

Mr. Driscoll: Yes, yes.

The Court: What is the testimony?

Mr. Driscoll: That Gutman & Company sold, these. There is one of them.

The Court: Exactly, but we know nothing about adhesive.

Mr. Driscoll: If your Honor pleases, the bills from Gutmann & Company put in evidence say so, what they sold them. Maybe I am confusing what it is. I am trying to find something.

What is this—I call it a seal of the enclosure. It is not an ordinary cap, it is a cap with something inside of it for a specific purpose.

The Court: All right.

Mr. Driscoll: That has already been admitted.

The Court: What else?

Mr. Driscoll: I want to ask this witness as an expert on those parts that this bottle that we bought from them, would it be possible for that chloroform if it came in contact with that sealable enclosure, I call it—

The Court: You can give him the exhibit in the case and ask him what the contents come in contact with.

[314] Mr. Driscoll: I will. I was going to try it by a drawing or something for that purpose. That is admitted in the cap that we bought from him and put on his bottles. We have got the invoices.

The Court: Go ahead. Now ask your question.

Mr. Driscoll: All right.

Q. Now, I show you that Government's Exhibit 21 and ask you is that—it has been testified in this case by the Government that that is one of the bottles sold to them containing alcohol

The Court: Containing what?

Mr. Driscoll: I am sorry.

Q. (Continuing) —chloroform with that enclosure on it. Now, if the contents were chloroform, would it be possible for that chloroform to come in contact with the part of the enclosure which you referred to as adhesive? A. Yes.

The Witness: May I, in order to identify this, pause to remove this cap?

The Court: Yes.

A. (Continuing) This is the inner seal. The closure that we furnished to Private Brands consisted of a metal cap similar to this one, but it is not the identical, the same one—I have no means of identifying it, of course—and[315] I recognize the liner.

This one here is called the liner, the tinfoil liner.

Q. Now before you go any further

The Court: No. Let him finish his answer.

Mr. Driscoll: All right, if your Honor please. He said it is not.

The Court: Go ahead.

A. (Continuing) In addition to that, there was a transparent inner seal in the cap. This seal is caused to adhere to the lip of the bottle by means of an adhesive application. The packer applies adhesive—there are several ways of doing it—to the bottle.

That adhesive, as you can see this bottle has a lip, is applied to the lip of the bottle and you have a body of adhesive on the lip of the bottle.

You then take the cap containing this membrane, this inner seal, and put it onto the bottle. In doing that, in inserting that adhesive, as could happen sometimes, some of it stays between the lip of the bottle and the seal, causing it to adhere. That is the purpose of the seal. Some of it, as you can see, there is a draw on the inside of the bottle. There is a d[illegible] s on the inside of the bottle lip.

[316] Some of this adhesive naturally will be squeezed toward the inside of the bottle. It has to go somewhere.

Is that the answer that you wanted? I can't identify this. There is no seal on it. Formerly presumably it was on there.

The Court: You can't say presumably.

The Witness: I seem to see some evidence of it.

Q. I show you Government's Exhibit No. 51. Is that your cap? A. I would have to take the package apart to identify anything. I would have to take this adhesive tape off and I would have to take this outer seal off.

Q. You mean to describe [illegible] A. I don't even know whether that has that inner seal on there. I can't tell unless I take the cap off. I would have to take this adhesive tape off and I would have to take the seal off, take the seal cap off to see if there is a seal.

Mr. Driscoll: Is there any objection?

Mr. Packard: I object because of the fact that is one of the bottles that has floating particles in it, and I offered it in evidence so that the jury could

see the particles and therefore I don't want anything tampered [317] with.

Mr. Driscoll: Well, will you concede that this is one of the bottles delivered to the Government with the Gutman seal, sealable enclosure?

Mr. Packard: I can't concede to the type of enclosure that the defendant put on the bottles before he shipped them out. I know he purchased Gutman enclosures at some time, but there is no proof and I don't believe it can ever be proved as to what he actually put on the seal of the bottles.

Mr. Driscoll: Would you kindly pass back those exhibits?

(Exhibits returned to Mr. Driscoll.)

Mr. Driscoll: That is all, Mr. Nossal.

Mr. Packard: No questions.

(Witness excused.)

The Court: Next witness.

Mr. Driscoll: Mr. Herman.

GEORGE HERMANN, called as a witness on behalf of the defendants, having first been duly sworn, testified as follows:

Direct examination by Mr. Driscoll:

Q. Now, Mr. Hermann, what is your present occupation? [318] A. I am a partner in the firm known as Manufacturers Aid Company. It is engaged in what is known as contract packaging.

Q. Were you in Government service? A. I was.

Q. When were you in the Government service? A. From the year 1941 to 1945.

Q. What was your position? In what division did you work? A. I was a procurement inspector for the Chemical Warfare Service of the U. S. Army.

Q. Are you a chemist? A. I have chemical training and a degree in chemistry.

Q. Where did you get your chemical training? A. Brooklyn Polytechnic Institute.

Q. How many years' experience have you had as a chemist? A. Well, I was involved in chemistry since 1932 but not directly in the capacity of chemist. I have handled chemicals all that period of time except for about five years.

Q. Since 1932? A. Except for about five years.

Q. Now you say you were a Government inspector at the Evans Cosmetics, Inc. plant? A. During my tenure with the Government I was part of that time stationed at the Evans Cosmetics plant in Brooklyn.

[319] Q. And what was the product produced at that plant that you were Government inspector of? A. At that particular plant the product involved a poison gas detector known as M9.

Q. Who was in charge of that plant? A. The director at that plant was Mr. Carey.

Q. Did he have any assistants that you met there? A. A number of assistants, yes.

Q. Did you meet them? Do you remember their names? A. Miss Dickson and a Mr. Ehrlich.

Q. Was Mr. Carey in sole authority and control of that plant? A. At the Brooklyn plant he was in sole charge, to my knowledge.

Q. Were there any difficulties at that plant—were there any difficulties connected with the production at that plant that you ran across?

Mr. Packard: I object, your Honor.

The Court: Sustained.

Q. At the time that you were working in this capacity for the Government inspecting this material, was it in its early stages of research? A. I beg your pardon, sir. I

didn't know that you finished your question. I thought there was something to follow.

[320] Q. In this plant where you were the Government inspector did you discuss the product that was being manufactured? Was it not something that was in the development stages at the Massachusetts Institute of Technology and starting to produce it— A. Yes, it was not a complete—

Mr. Packard: If your Honor pleases, I request your Honor to direct the witness to wait until the question has been completed.

The Court: Yes, I will sustain the objection to that question and have the answer stricken.

Give the attorney an opportunity to state his objection before you answer.

Q. Were there any difficulties in that plant and in the product that was being produced—difficulties with regard to working out proper specifications—and did Mr. Carey assist the Government, you or anybody else employed by the Government, in trying to work out proper specifications? A. Yes.

Mr. Packard: I have to make the same objection.

The Court: I told you not to answer until the Government representative rises.

The Witness: I am sorry.

The Court: I sustain the objection.

[321] The Witness: I am sorry, I thought you referred to counsel finishing his question.

Q. Do you remember a conference at Edgewood at this time?

The Court: What time?

Q. When you were going to the plant of this corporation that I just mentioned before—Evans Cosmetics—and

inspecting in your position as a Government inspector, in the course of your visits there for the purpose of inspection do you remember Mr. Carey speaking about a conference and arranging a conference of Government officials and contractors and a conference being held at Edgewood?

Mr. Packard: I make the same objection, your Honor.

The Court: The same ruling.

Q. Were you at any time in the course of your inspection at this plant, visits for inspection, restricted or refused permission to do what you want to do to effect a proper inspection?

Mr. Packard: I object, your Honor.

The Court: Sustained.

Q. Did Mr. Carey at any time entertain you? By that I mean take you to lunch, take you to dinner, take you to shows or any such thing as that while you were the Government [322] inspector inspecting materials at this corporation's plant?

Mr. Packard: I will have to object again.

The Court: Are you going to ask a question in respect to character now?

Mr. Driscoll: Yes, your Honor.

The Court: Then put the question in the usual way in respect to establishing what is ordinarily done when character evidence is sought.

Q. Mr. Hermann, have you ever discussed with other persons the type and character, the type of man Mr. Carey is or what his character is? A. Yes, sir.

Q. What have other people said to you with reference to the character and type of man that Mr. Carey is?

Mr. Packard: I object to the form of the question.

The Court: Well, it isn't the right form. I will take the answer.

A. He is a man that they are glad to know personally.

Q. And from your experience and contacts with him and association with him and from what other people, opinions other people have expressed to you with reference to Mr. Carey, what in your opinion, as you say, is the character of Mr. Carey?

Mr. Packard: I object to that, your Honor.

[323] The Court: Overruled.

A. His character is good. He is honest. He has good integrity. He has a good reputation in the field in which we are frequently competitors and other competitors also have that same opinion. He is willing to be helpful and in general, as we understand character, his character I would say is good.

Q. Does your experience, as you have related, as a Federal inspector and businessman and your education, where you went to school in chemistry, as a result do you know chemicals, chemistry and chemical compounds?

The Court: Well, he has already said what he knew about chemistry.

Q. Are you familiar with a designation which is referred to as technical and a designation which is referred to as U. S. P. with reference to a chemical? A. I do.

Q. Isn't it possible or isn't it a fact from your experience that a chemical which is designated technical would and could pass as U. S. P.?

Mr. Packard: I must object to that, your Honor.

The Court: Yes. You can ask him that, if any, difference there is between chloroform U. S. P. and chloroform technical, if he knows.

[324] Q. If you know, what if any difference is there between technical chloroform designated technical and chloroform U. S. P.? A. At the moment I don't know what is prescribed in the U. S. Pharmacopeia which specifies that chloroform of the U. S. P. chloroform, as is stated, but in the general term of application of U. S. P. material it has to conform with the specifications outlined in this particular book known as the U. S. Pharmacopeia, which consists of estimates for U. S. P. chemicals, and a technical grade can meet that grade, but usually does not come up to the full standards, but it is possible that it can and also be termed technical at the same time.

Q. In other words, it can be termed technical but it will pass a U. S. P. test? A. Yes, it may.

Mr. Packard: I didn't hear that.

The Court: Strike out that last.

I sustain the objection to the last question.

Mr. Driscoll: That is all.

Mr. Packard: No questions.

(Witness excused.)

The Court: We will take a short recess.

(Short recess.)

[325] The Court: Will you call your next witness, Mr. Driscoll.

Mr. Driscoll: Yes, your Honor. Mr. Horvath.

Louis E. Horvath—for Defendants—Direct

Louis E. Horvath, called as a witness on behalf of the defendants, having first been duly sworn, testified as follows:

Direct examination by Mr. Driscoll:

Q. Mr. Horvath, are you employed at Private Brands, Inc.? A. I am.

Q. Were you employed at Private Brands, Inc. in the year 1952? A. I was.

Q. More particularly January, February and March of that year? A. Right.

Q. And at that time the Private Brands, Inc. had a contract, did it not, with the Government for chloroform? A. That is right.

Q. In your position did you see the bottles the chloroform was put into? A. Yes, sir.

Q. Did you see the caps that enclosed those bottles after the contents were put into the bottles? A. Yes, sir.

Q. Can you tell this Court and this jury what caps or sealable enclosures were put on the bottles that were filled [326] with chloroform and shipped to the United States Government pursuant to the contract? A. The caps came in cartons from Ferdinand Gutman & Company.

Q. Were there any bottles sealed with anything but Gutman sealable enclosures? A. That was the only type of cap we had around from Ferdinand Gutman.

Q. No. The question is, was there any bottles sealed with other than Gutman sealable caps or enclosures? A. No, sir.

Mr. Driscoll: That is all.

The Court: Thank you. That is all.

(Witness excused.)

Mr. Driscoll: Mr. Nossal, recalled.

Philip Nossal—for Defendants—Direct

PHILIP NOSSAL, recalled as a witness on behalf of the defendants, having been previously sworn, testified as follows:

Direct examination by Mr. Driscoll:

Q. Mr. Nossal, the prior witness has testified that every bottle that left the plant of PBI with contents chloroform was sealed with a Gutman sealable enclosure.

Now, I show you Government's Exhibit No. 51 which is in evidence as one of the many bottles—

[327] The Court: You showed him Exhibit 51. Now, what is the question about.

Q. The question is, could you using that exhibit to describe to the jury what might or might not happen if the chloroform contents thereof came in contact with your Gutman sealable enclosure?

Mr. Packard: I object, your Honor.

The Court: You don't limit the question to chloroform, do you?

Mr. Driscoll: Well, I am limiting it to that because that is the only involved in the case.

The Court: Then the question should relate to chloroform and you will have to qualify the witness in respect to his knowledge of chloroform and what

Mr. Driscoll: I am sorry, Judge, I misworded that question. You are perfectly right. I now realize that I asked it as to the effects.

I withdraw that question.

Q. Would you tell the jury and the Court whether or not it would be possible, it could happen, that the adhesive of that sealable enclosure might come in contact with the

contents of the bottle, be it chloroform or anything else? A. I believe I testified before that an adhesive applied to the mouth, to the lip of the bottle, the seal, Filmaco [328] seal, calling it by the trademark, is in the cap and when the cap is applied the adhesive which rests on the lip of the bottle in varying degrees, depending on application and so on, is squeezed, some of it squeezed toward the inside and some towards the outside.

Some of it's sets, naturally, between this seal, this Filmaco seal and the lip of the bottle, and whatever dissolved, to answer your question, whatever dissolved, is squeezed toward the inside of the bottle, naturally can come in contact with the contents.

Q. Would that happen because of improper operating of sealing or would it happen even if it were properly, the operation of sealing were proper? A. To a very limited degree it can happen under the most favorable application of adhesive.

Mr. Driscoll: That is all.
The Court: There is no cross?
Mr. Packard: No cross, your Honor.
The Court: Thank you. That is all.
(Witness excused.)
Mr. Driscoll: Mr. McNeilly.

PATRICK JOSEPH MCNEILLY, called as a witness on behalf of the defendants, having first [329] been duly sworn, testified as follows:

Direct examination by Mr. Driscoll:

Q. Mr. McNeilly, what is your occupation? A. I manufacture wooden boxes.

Q. Of all types? A. Not all types. Nail wooden boxes.

Patrick Joseph McNeilly—for Defendants—Direct

Q. Do you manufacture wooden boxes to be used to pack chloroform? A. Yes, sir.

Q. Now, did you supply or have you supplied these boxes, as you term them, to Private Brands, Inc.? They bought them from you? A. Yes.

Q. They have been buying them from you for several years? A. Yes, sir.

Q. Have you received orders with specifications for Private Brands as to the particular type of box and shape? A. Yes, sir.

Q. In other words, specified type of boxes? A. I have.

Q. And in the purchase of boxes by PBI the sale was made at the usual prices? A. Yes, sir.

Q. There was not at any time any endeavor or attempt by Private Brands, Inc. to obtain them shall I say cheap? A. No, sir.

Q. Now, was there a time when Private Brands, Inc. [330] ordered specified types of wooden boxes or boxes and you delivered them to them and they rejected them? A. Yes, sir, there was.

Q. What was it? A. We had to take the boxes back and replace them.

Q. When Private Brands, Inc. rejected the boxes which you had delivered to them for a specified purpose, did Private Brands or an officer or employee of Private Brands you say it was who? Mr. Carey? A. Yes.

Q. Did he say that the boxes had been inspected by the Government inspector? A. No, sir.

Mr. Packard: I object, your Honor.

The Court: Sustained.

Q. Did he—

The Court: Don't answer until counsel for the Government rises after a question is put.

The Witness: Yes, sir.

Q. Did Mr. Carey tell you why he rejected them?

Mr. Packard: I object again, your Honor.

The Court: Sustained.

Mr. Driscoll: That is all, Mr. McNeilly. Thank you.

(Witness excused.)

Mr. Driscoll: Mr. McIntosh.

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[331] JAMES S. McINTOSH, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Driscoll:

Q. Mr. McIntosh, what is your present occupation? A. I beg your pardon, sir?

Q. What is your present occupation? A. I am a sales representative of Private Brands.

Q. Prior to your present occupation were you employed by the Government? A. Yes.

Q. In what capacity? A. I was procurement specialist for the Quartermasters of the Army.

Q. For how long? A. Twelve years.

Q. And in your twelve years in the Government in that position the volume of contracts, was that large, that you handled? A. I can't quite hear you.

Q. Were the purchases that you made in your twelve years as a Government employee, was the volume large or was it small? A. Very large.

Q. Did it cover a variety of articles? A. Yes, sir.

[332] Q. Were you at any time while in that position with the Government responsible for the placing of any

Government contract with Private Brands, Inc.? A. Not directly, no, sir.

Q. Did you have anything to do with contracts which had been awarded to Private Brands indirectly or in any other manner? A. Yes, I did.

Q. What manner? A. In advisory.

Q. Now, do you recall a contract awarded by the Government to Private Brands for DDT airplane spray?

Mr. Packard: I object to that, your Honor.

The Court: Sustained.

Q. Who was the commanding officer of the New York Quartermaster's Procurement Agency at that time? Do you know his name? A. General Grice.

Q. Did General Grice ever talk with you or discuss with you anything with reference to Mr. Carey as to the type of man he was?

Mr. Packard: I object, your Honor.

The Court: Is that character witness material that you are seeking, Mr. Driscoll?

Mr. Driscoll: Yes. Well, it is sort of a yes and [333] no answer.

The Court: Well, if it is yes or no, then I will sustain the objection.

Q. Mr. McIntosh, were you familiar with varying contracts between the Government and Private Brands, Inc.? A. Just two.

Q. Just two. What were they? A. The DDT airplane spray and Grade A cement.

Q. Now, while those contracts were being fulfilled were Government inspectors or inspector from the Quartermaster's Corps, I presume, on the contractor's premises at all times while the contract was under production?

Mr. Packard: I object, your Honor.
The Court: Sustained.

Q. Were you there?

Mr. Packard: I object.
The Court: Sustained.

Q. In your position you say you were procurement officer, is that right? A. Procurement specialist.

Q. Did you have anything to do with assigning inspectors to a plant of a contractor? A. No, sir.

Q. Did you have anything to do with or were there in your capacity, in your position, submitted to you laboratory [334] inspection reports with reference to a contract between the Government? A. Yes, I was.

Q. Why were they submitted to you, Mr. McIntosh?

Mr. Packard: I object.
The Court: Sustained.

Q. Well, when they were submitted to you, Mr. McIntosh, did you read the laboratory report?

The Court: Sustained.

Q. What were your duties with reference to laboratory reports?

Mr. Packard: I object.
The Court: Sustained.

Q. A Miss Weissman testified in this case. Do you know Miss Weissman? A. I have heard of her. I don't know her.

Q. You were not in the same office? A. No.

Q. You were in a different office? A. That is correct.

Grace Hazard—for Defendants—Direct

Q. What was her position or the work in which she engaged? Was her position the same as yours? A. That I would not know because she was with the Medical Agency in Brooklyn and I was with the Quartermaster in New York.

Q. Now, Mr. McIntosh, in your position in the Quartermaster [335] Corps—I withdraw that question.

Mr. McIntosh, I show you two papers marked Defendants' Exhibit C for identification.

(Witness examines papers.)

The Court: What is the question?

Q. Mr. McIntosh, during your years in the Army Procurement did the Army Procurement ever refuse a request on the part of a contractor for a—that is, your department ever refuse a request for a reinspection which inspectors took on the rejected material?

Mr. Packard: I have to object.

The Court: Sustained.

Mr. Driscoll: That is all, Mr. McIntosh.

Mr. Packard: No cross.

(Witness excused.)

Mr. Driscoll: Mrs. Hazard.

GRACE HAZARD, called as a witness on behalf of the defendants, having been previously sworn, testified as follows:

Direct examination by Mr. Driscoll:

Q. Now, Mrs. Hazard, I believe the jury will remember you were on the stand before and you were qualified as to

what you did and what your position is and what you did in [336] that position.

I want to show you, Mrs. Hazard, sheets, a group of sheets. They are called—I don't know—they are defendants' sheets. Will you tell me? A. They are daily production, listing of daily production.

Q. Do they fairly represent the daily operations in the plant of Private Brands, Inc.? A. Yes.

Q. And what are the total different operations in a normal typical day in Private Brands, Inc.? A. Well, there are this many—

Mr. Packard: I must object. She is testifying from papers that are not in evidence.

The Court: No. The papers may refresh her recollection.

Mr. Driscoll: I will put them in evidence, your Honor.

Q. Are those records the official records of Private Brands, Inc.? A. They are. The date is November 12, 1954. It shows the work of the day shift and the night shift, and there are approximately thirty different products on which we work. The total number of girl hours spent that day was 1212.

Q. Don't read it yet. I just want to put it in evidence.

[337] Mr. Driscoll: I offer this in evidence.

Mr. Packard: I would like to state that the date on these sheets is in November, 1954, and I am going to object on the ground

The Court: Sustained.

Mr. Packard: But I have no objection if counsel wants to let the witness refresh her recollection for what value it has.

Mr. Driscoll: I will withdraw the offer.

Q. I give you these papers and tell me what they are. Are they official records of Private Brands, Inc.? A. That is right. These are carbon copies, but it is a copy of the original. We make them in duplicate.

Q. And what are the dates of those? A. February 20, 1952; February 19, 1952; February 18, 1952; February 15, 1952.

Q. All right. Will you give them to me, please?

(Papers returned to Mr. Driscoll.)

Mr. Driscoll: I offer these records in evidence.

Mr. Packard: I have no objection.

The Clerk: Defendants' Exhibit D.

(Papers referred to are marked Defendants' Exhibit D in evidence.)

The Court: We will take a recess until two o'clock.

(Recess to 2:00 p. m.)

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[338] AFTERNOON SESSION

(The following ensued without the presence of the jury:)

Mr. Driscoll: If your Honor pleases, I have a motion to make with reference to the individual client. I think it would be better, it is entirely up to your Honor, that I make it now before the jury is brought in, or if you care to, I will make it after the jury is brought in.

It is a renewal of the request which was originally made at the opening of the trial that Mr. Carey desired to be his own counsel, which was denied.

He then requested that he be permitted, as it were, to act as co-counsel and cross-examine technical witnesses, which you decided. I recollect you said you would decide

when the occasion arose, and he now has a witness that he is going to call and he wants again to state that he personally be permitted to examine.

The Court: I shall deny the motion in all respects.

Let me look at the original indictment.

The original indictment shows an arraignment on December 8th.

Mr. Driscoll: That is right.

[339] (Jury convenes.)

The Court: When you appeared for both defendants.

Mr. Driscoll: That is right, your Honor.

The Court: And there was no effort made at that time for the privilege of having the individual defendants appear for himself, and nothing was said on the calendar call on the 24th of January nor on the 27th.

And for the reasons that I stated originally, the motion is denied.

Mr. Driscoll: Mrs. Hazard.

The Court: Mr. Scoft also calls my attention to the fact that there was a motion made in this case on December 14, 1954, in which you sought a bill of particulars and you appeared for both defendants.

Mr. Driscoll: That is right, your Honor. May I just add this, very quietly, simply: It is the request of the said defendant that I didn't tell you the reasons he wanted to do this, and if I may, it has been found impossible to provide technical background in the time allotted for preparation.

But permit me to point out that the evidence shows a period of preparation extending from 1952 to August, 1954, by the Government. We do not believe the seven weeks allotted to defense counsel allows an equitable [340] opportunity—

The Court: Well, I don't care to go into that.

Mr. Driscoll: Your Honor, he asked me.

The Court: Mr. Driscoll, I stated to you when the trial began that any questions that the individual defendant

wanted he could suggest to you and you could put the questions.

Now, I must say that throughout the whole trial I have given you that opportunity.

Mr. Driscoll: You have, your Honor.

The Court: And as a result we proceeded at a pace so slow that I don't recall in twenty-five years of my experience on the Bench a case in which I have permitted the matter to drag along.

However, in continuance, I will permit you to consult with the individual defendant and have him suggest to you any questions that you feel he wants to have put to the witness.

Mr. Driscoll: Your Honor, thank you very much for listening to me.

Mrs. Hazard.

GRACE HAZARD, resumed.

[341] *Direct examination by Mr. Driscoll* (continued):

Mr. Driscoll: As I recall, when we discontinued or adjourned or recessed the witness had identified this Defendants' Exhibit D.

Q. Now, that Defendants' Exhibit D consists of several daily production records or production for the particular day denoted on the sheet. Right? A. Yes.

Q. Now, Mrs. Hazard, on that first page, that first day's report of production, can you tell me from there the total number of, let us say, manhours worked in the plant for that particular day in the total plant?

Mr. Packard: I object, your Honor, unless this relates to the particular contract in question.

The Court: I don't see the relevancy.

Mr. Driscoll: If your Honor please, I am going to ask her that and I am going to say on that particular sheet are there operations with reference to this particular contract.

The Court: Put that question first.

Mr. Driscoll: All right, I will reverse the order.

Q. On that sheet is there a report of number of manhours—now correct me if I use the wrong terminology—manhours taken on that day in the plant for production on the contract involved in this action? [342] A. We call them girlhours because women work on them. There are 44 girlhours on chloroform and 4 manhours on chloroform.

Q. And what is the date of it? A. February 20, 1952.

Q. And that is exclusively with reference to the contract record for chloroform? A. Yes.

Q. What are the total girl and manhours, if such be the case, for the whole day—total production?

Mr. Packard: I object to that, your Honor.

The Court: What is the relationship? What difference does it make?

Mr. Driscoll: To show that this particular contract that is involved was a small part of the plant's work.

The Court: I will sustain the objection.

Q. Now, Mrs. Hazard, is the production of items, these particular items that we are limited to, work for chloroform by Private Brands, Inc., subject to inspection by the, shall we call it, your client—in this case it is the Government—you are at your premises or at the premises of the client? A. Yes.

Q. And is it a fact that sometimes the said client using that name to denote the other party to the contract

[343] maintains a full-time inspector on your premises, Private Brands? A. Yes, that is right.

Q. Is that the common practice in the business, in the trade? A. Well, sometimes there is a full-time inspector and sometimes an inspector just comes in now and then.

Q. Do other employees of the client, such as manufacturers or the president or some such other than inspectors of the client, do they have access to the production in the plant where the work is being done? A. Yes. They generally stop in the office and let us know that they are there, but they do have access to the plant.

Q. Is that common practice in your business, in the business of Private Brands, Inc.? A. Yes.

Q. Does your corporation, Private Brands, Inc., submit samples of the production to the client, be it the Government or some other client, of these tests, laboratory tests? A. In some cases we submit the sample to the client and in some cases we submit them to an outside laboratory for testing.

Q. You mean that you would give the samples— A. To an outside laboratory specified by our client.

Q. Do I understand you rightly that a client might say [344] to you, "Don't send us a sample of the product for laboratory test; suppose you send it to X, Washington, and we will abide by their test"? A. That is correct.

Q. Have you at any time talked with purchasers from your firm, individual or officers of the purchasers, talked with them with reference to the ability of Mr. Carey in the business that he is in?

Mr. Packard: I object, your Honor.

The Court: Sustained.

Q. Have there been occasions when clients have rejected your production pursuant to the contract that they had with you?

Mr. Packard: I object, your Honor.
The Court: Sustained.

Q. Can you tell me succinctly in a few words what the procedure is in your corporation, Private Brands, Inc., when you are notified in some way or other, they say—and limit it right to this contract—a Government inspector wants to come and inspect, what happens? Does he come and walk into the plant or what? A. Of course, he walks into the office. Anybody can walk into the office. And I might greet him or one of the girls might, and if he wants to go outside and it might be we got [345] Lou Horvath, it might be, or if it is work in production we would probably turn him over to the woman in charge of the plant to look at the work being produced.

Q. And when he was through with his inspection would you know whether he left or would he just leave whatever floor he happens to be on or would he come back to the office? A. He wouldn't come back to the office necessarily.

Q. Now, you were in charge of all vouchers for expense accounts of employees or officers of the corporation. A. That is right. I sign the checks and I handle the petty cash.

Q. Of your own knowledge, have you ever received vouchers from Mr. Carey based upon his entertaining Government inspectors—

Mr. Packard: I object. I am sorry, Mr. Driscoll.
Mr. Driscoll: That is all right.

Q. (Continuing) Or contracting personnel?

Mr. Packard: I object, your Honor.
The Court: Sustained.

Q. And Mr. Ehrlich and Mrs. Dickson—who, by the way, is Mrs. Dickson? Would you know who I am referring to? A. Yes.

Q. What is her position in the company? A. She is now in sales work. She is vice-president of the [346] company.

Q. Has Mr. Ehrlich or Mrs. Dickson, or Mr. Horvath submitted vouchers for entertainment of such procurement or inspection personnel of the Government?

Mr. Packard: I object.

The Court: Sustained.

Q. Do you of your own knowledge know whether or not Mr. Carey at times, let us say, disputed or objected to the Government reports of analytical nature or lab reports?

Mr. Packard: I object again, your Honor.

The Court: Sustained.

Q. In the production of the chloroform in this contract was all production always under the full-time Government inspection? A. I think not. I mean, they always had the privilege but I think they did not have an inspector stationed there all the time, but he always had the privilege of coming in.

Q. Now, Mrs. Hazard, you have maintained what are called lot control numbers on the large number of items in the plant? A. That is correct.

Q. Are you familiar with their purpose? A. Yes. A lot number is used to designate certain quantity of bulk. We can have two lot numbers meaning the same bulk. Spirit ammonias is generally packaged under two lots. A [347] sufficient amount of bulk.

200 gallons fills up about 48,000 bottles and the bottles come in A-47, 24,000, A-48, 24,000. So ordinarily one lot of bulk is packaged under two lot numbers.

A lot of tablets—

Mr. Packard: Your Honor, I am going to move to have the witness's answer stricken on the ground that it is not relevant to the issue involved.

The Court: I will deny the motion.

A. (Continuing) On the lot of tablets, the tablets themselves have a lot number but the lot number printed on the label or box will not be the same. I mean it may be the same or it may not.

But there is a record kept that 5024 means 5011. Some of the boxes are coded as they come to us, and therefore that number would not be the same as the bulk tablets.

Where we get wrong labels, the tablet number would be on the label.

Where the deals are packaged which include two or three products, each product has a number on it, but the deal is given still another lot number.

Q. Now, have you finished, Mrs. Hazard? A. I think so.

Q. Let me ask you this: May the lot identity of an item [348] such as you are describing also indicate the contents of the particular package? A. Well, it does. I mean, it doesn't have to be the same number, as I think I made clear, but it does show what it is. There will be some record kept of what number means what.

Q. In other words, if a—let me put it this way then to clarify it so that we understand each other: If the items indicated on the label, items indicated on the label are altered, would there have to be a new lot number? A. Yes. That happens with the deal stock. The two products you package still have that number but there is still another number given, or if there is any change in the packaging it would have another lot number.

I mean, any addition to the package. The deal I used to illustrate it, it wouldn't have to be a deal, it could be some addition to that original package. Maybe a different label put on it or something.

Q. That is just what I am talking about. For instance, if I had a label on certain contents and it had N-1 and some

number, and then in addition to that it had on that label Lot No. so and so.

Now when that was inspected an objection was made to the X-1, 3,000 or something or other as being a deviation under the contract.

[349] Would it be permissible or is it the custom in the trade and in your business as part of the trade to change, to put on a new label, change it to the requested one of no X, just 1-20-something or other—would you have to change the lot number or could there be another lot number and still be the same thing?

Mr. Packard: I object, your Honor.

The Court: No, I will let her answer the question.

A. Our practice is any change would require a different lot number.

Q. In other words, if you had changed that label because it said X-1 and make it conform and show 1-so, and so, when you take off the label and put the new label you couldn't use say 1-30 that was on the wrong X-1 label, you put a new label on the 1-30 and you would put another lot number? A. I don't know whether you could, but we don't. We change the lot number.

Q. You do it? A. We do it.

Q. And it is common practice and business practice?

The Court: No.

A. That I don't know. I know what we do.

Q. You know what you do. You don't know what any body else does? A. No.

Q. And if you know that you did it in Private Brands, [350] would that mean that you changed the contents of the bottle? A. No.

Q. Do these labels that we are referring to that are put on bottles with the lot number, do they also, on that label, on that bottle, do they also indicate the date of manufacture? A. The Government ones do.

Q. All right. Then in this contract that was produced or fulfilled in Private Brands, Inc., those labels on those bottles showed the date of manufacture? A. That is right.

Q. In addition to what you have described. There is not any doubt in your mind about that, is there, Mr. Hazard? A. No. We do that.

Q. So if a witness in this case testified that he inspected some of those bottles, several hundred of those bottles, and stated that the labels did not show a date of manufacture, would that be so, in your opinion? A. I never saw a Government label without a date of manufacture that we used.

Q. I show you a paper, a bill of Merck & Company, dated —— Will you look at it and tell me the date. A. January 24, 1955.

Q. Are those the records—are those papers from the [351] records of Private Brands, Inc? A. They are.

Mr. Driscoll: I offer it in evidence.

Mr. Packard: I object, your Honor, on the ground that it is irrelevant—Merck & Company again.

The Court: Not only that, but the date is later than the event charged.

I sustain the objection.

Mr. Driscoll: If your Honor pleases, may I say the purpose of this offer is that the defendant Private Brands, Inc. has no material to test that was produced under the contract in which the complaint is made.

The Court: Nevertheless, I sustain the objection.

Mr. Driscoll: And this is a sample which we sent to outside independents.

That is all, Mrs. Hazard.

Mr. Packard: No cross.

(Witness excused.)

Mr. Driscoll: If your Honor pleases, I was going to call a witness for this purpose, and I don't want you to feel—if you feel that you don't—I want to explain the reason I am going to call him and ask you to decide.

I am going to call a gentleman who bottles chloroform with these Gutman adhesives—I have forgotten [352] the word now but anyhow the caps—that bottles the chloroform and he has a bottle showing a little of chloroform with this Gutman seal on it which shows that there is a sediment in the chloroform, with the idea thereafter, I hope, to prove that the sediment is due to that seal.

The Court: Where is that witness?

Mr. Driscoll: I have the witness here.

The Court: Well, call him.

Mr. Driscoll: Mr. Horvath.

Louis E. Horvath, recalled as a witness in behalf of the defendants, having been previously sworn, testified as follows:

Direct examination by Mr. Driscoll:

Q. Now, Mr. Horvath, did you as an employee of Private Brands, Inc. have tested or buy or obtain a bottle of chloroform with what is called the Gutman seal caps on? A. From an outside supplier.

Q. From an outside supplier? A. I can't certify to the Gutman seal on it, but I received chloroform.

Q. You can't certify that. What do you mean you received? You mean as an employee in the plant? [353] A. I received. I mean those bottles there.

Q. These bottles here? A. Yes.

Q. Well, what are they? A. They are chloroform from Fisher's Scientific Company and Scientific—

Q. Scientific Glass Apparatus? A. That is right.

Q. But you do not know whether or not they have Gutman seals. Is that what you said? A. That is right.

Q. I show you a bill, an invoice of Fisher. Is that the invoice of the— A. The top one is the invoice dated January 13th.

Q. Showing a purchase from that— A. Of one 5-lb. bottle of chloroform U. S. P. and three 1-lb. bottles of chloroform U. S. P.

Mr. Packard: If your Honor please, I object to the witness reading from an invoice which is not in evidence.

The Court: Well, I overrule the objection.

Q. You say it shows what? A. Can I go ahead?

Q. No. Is that a record—can you testify that that is a record of the corporation? A. This is an invoice. My receiving ticket is in the back [354] here.

Q. So that is a record, an official record, to your knowledge, of Private Brands, Inc.? A. That is right.

Mr. Driscoll: I offer it in evidence.

Mr. Packard: I object, your Honor, on the ground that it is irrelevant and shows apparently an invoice dated 1955 and it has got the heading "Fisher Scientific Company."

The Court: Let me look at it, please.

(Document shown to the Court.)

The Court: I don't know yet what the relevancy of this is, Mr. Driscoll.

Mr. Driscoll: If your Honor pleases, I want to show that we took a bottle of U. S. P. chloroform with the Gutman seal.

The Court: There is nothing about a Gutman seal here.

Mr. Driscoll: That does not describe it as a Gutman seal. It is just a bottle of chloroform, as I recollect, your Honor, U. S. P., which was sent to them for laboratory test. It was the only way that we could check—

The Court: It was sent to whom?

Mr. Driscoll: It was bought from them. I am [355] sorry. I should say bought from, that particular one. This is another one, the other bottle that we bought from another outfit.

We then took it and gave it to an independent chemical house and had them test it to see what that showed, and it showed certain things.

The Court: So, in the first place, you ought to have somebody from the Fisher Scientific Company who will testify in respect to the description on the invoice. The invoice, for one thing, does not say anything about not for anesthesia.

Mr. Driscoll: I am sorry, your Honor, mine does. Doesn't that say one bottle chloroform U. S. P. not for anesthesia?

The Court: The receipt of Private Brands, which is unsigned, but that obviously but not the invoice of Fisher Scientific Company.

Mr. Driscoll: All right, your Honor, then I thought they were both the same.

Will you look at that, your Honor, and see the invoice, one bottle of

The Court: Well, that is better.

Mr. Driscoll: I am sorry I didn't look at both of them. I just picked up the first one.

[356] Q. Then I had better let you see this. You didn't see that one. Is that a record of the Private Brands, Inc. original record invoice? A. That has an invoice on the top.

Q. The top invoice. A. And my receiving ticket below that, and it has one 5-lb. bottle of chloroform U. S. P. not for anesthesia and three bottles at one pound each U. S. P. not for anesthesia, and below that is the purchase order.

Mr. Driscoll: I offer this in evidence.

The Court: It will be received subject to connection.

The Clerk: Defendants' Exhibit E.

(Document referred to is marked Defendants' Exhibit E in evidence.)

Q. Now, Mr. Horvath, you have stated that part of these papers is some of your personal—

The Court: He has identified them.

Q. Now, Mr. Horvath, will you tell me, very briefly, what your particular duties are? A. My title is traffic manager, which includes in charge of shipping, receiving, warehousing and the supply of materials for the production line.

Q. And in that position with Private Brands do you have [357] contact with Federal inspectors? A. Yes, sir.

Q. Do they come directly in to see you first? A. Sometimes they go direct to the office and the office requests me to take them around, or sometimes they ask me and I take them around and show him the material for his inspection or he is freely to inspect.

Q. So sometimes he might be walking around without you at all? A. He might be walking around the plant for half a hour before I find him.

Q. What instructions, if any, did you receive from Mr. Carey of Private Brands with reference to permitting inspection? A. To comply with his wishes in all forms to inspect markings and inspection and any samples he cares to take from any position on the pallet.

Q. What is a pallet, briefly? A. A pallet is a platform to load materials on. This type of platform has a—oh, it is about 44—ours is 44 by 36. The boards are spread apart about a half-inch and on the bottom—is a sort of platform—on the bottom is two boards so a pallet truck would fit in there and lift it up.

Q. And that is for the purpose of moving material from one place to another? [358] A. That is right.

Q. Of course the inspectors are all different human beings and react differently to various—to occasions? A. That is right.

Q. Can you tell me, have you submitted vouchers to the cashier or to the company for expenses for entertaining—

The Court: Now, you know I am not going to allow a question like that.

Q. Do you also contact or come in contact with civilian inspectors? A. Yes, sir.

Q. That is other than the Government? A. (No response.)

Q. When do the materials first come under your control or supervision? A. As soon as they come off the truck a count is made of the number of cases or barrels or drums. As it comes off the truck a count is made, checked against the truckman's receipt.

Q. That is the material, the raw material, let us say, the materials purchased by PBI first come into your plant and then go through the operations? A. That is right.

Q. So they remain under your control or supervision from that time until they are shipped out? [359] A. That is right.

Q. So that you supervise the complete— A. I supervise everything but the production of the material. I warehouse, I bring it in the warehouse, too; put it on the production line, take it off the production line and put it down in the warehouse and ship it out.

Q. And the only thing that you don't take charge of was in between, what you call production? A. The production.

Q. How often, if at all, have you seen Mr. Carey in the plant, any part of the plant, in talking with Federal inspectors or having conferences with them? A. Not in the conference—

The Court: Sustained.

Q. Are there any inspection markings put on the individual case before it is shipped out from the plant? A. There is an inspector's stamp put on after it is strapped and sealed and all the stenciling marks put on it. That is, a final inspection ready for shipment the inspector has his stamp put on.

The Court: You mean inspector employed by Private Brands?

The Witness: No, I am talking about the Government inspector's stamp.

[360] The Court: Suppose he isn't there?

The Witness: We call him when we have a shipment and he comes in. We can't make a shipment out until he releases it.

Q. Is he the only one authorized to put the stamp on it before you release it for shipment? A. That is right.

Q. Put the Government inspector's stamp? A. That is right.

Q. Now, these inspectors, you said you were with them when they go around and inspect—you have been with them? A. That is right.

Q. When the Government inspector comes in to inspect, say this particular contract for chloroform, what does he inspect? Everything? Or just part of it or what? Is it

one man that inspects packing, casing, boxing, contents, labeling, and so forth, or do they have different inspectors for different parts? A. Well, there is a separate inspector for everything. When he comes in for sampling, they are in corrugated boxes sealed. I have them all warehoused in different lot numbers and I show him all these different lots on the floor, and it is up to him to take or ask me to open a case of samples from wherever the lot is.

[361] If I have to pull ten pallets out of his way so I can get at a certain sample, I have to do that, but he picks his own samples.

Q. These are packed when he comes in in cases how high? A. Oh, they run perhaps thirty or forty. I don't remember. I might have five in a row, seven high or eight. I have to watch my weight load. I am only allowed 750 pounds.

Q. How high? A. On them cases we had, that one ran 52 pounds. I wouldn't put on more than forty cases, not more than forty cases, so it would not be more than eight high.

Q. Eight high. By looking at me, by looking at me one on top of the other for eight times? A. That is right.

How high looking alongside of me? A. They would not be more than five feet high.

Q. So that if I were the inspector, I could reach up on top of any of these sections and break open a casing and pull out a bottle? A. That is right.

Q. And that you say is the procedure of the inspector? A. Yes, sir. If he wants a case from the top I will have to clear that pallet. If he wants a certain case on the bottom, I will have to lower the pallet.

[362] Q. When he wants a bottle out of that bottom case you take everything off and he breaks the case and takes out a bottle? A. Right.

Q. Now, in doing that does he inspect the case, the boxing? A. Oh, yes, he inspects the seal.

Q. No, not the seal. We are starting on the outside. Does he inspect the case in which the bottle are contained? A. Oh, yes, he inspects all that, he looks that all over. He looks at the bottom to see if he has the right test carton.

I don't remember whether we had come back on these seals or we cleared them, but at times we clear a case or lower it, so he could come back on them.

Q. Let me get clear on it and everybody here clear. A case hold 25 bottles? A. 24.

Q. 24. What I mean by a case is that outside covering. Now, when you break that nest—I call it a box—you said there is also what they call packaging? A. That is right. There is a partition, we call that nest.

Q. What does the inspector inspect? Does it check then the inside packaging? A. Yes, he checks all that.

Q. And then he personally takes, himself takes out one [363] of the 24 bottles? A. That is right.

Q. Does he inspect the bottle? A. He takes the bottle with him upstairs.

Q. He just— A. I mean, he takes a sample—one, two or three—whatever samples he wants, and he takes them up to our office and he makes papers up. He has got to make

Q. Does he inform you when he is ready? A. I just take him up to the office and help carry the bottles up or I leave him.

[364] Q. That is the last you have seen of him? A. I probably mail that out for him.

Q. The Government inspector would ask you— A. After he put his seal on and inspection papers are on the bottle, he would give it to me to mail out for him.

Q. And then he would leave the plaint? A. That is right.

Q. And you then proceeded some time thereafter to mail these to the place he told you to mail them? A. The same day. I would ask the inspector if he wants to stand

by while I mail the document, to package it up, and sometimes he did and sometimes he just left it in my hands.

Q. Now, Mr. Horvath, you know, don't you, that there were rejections by the Government in this contract, some of the material in this contract? A. That is right.

Q. Now, do you know how much the contract, the original contract called for, how many bottles? A. No, sir, I wouldn't know that, the amount. I mean, that is not my department.

Q. Now, irrespective of the amount, the first, shall we say, the first batch or number of cases of bottles you knew were the result of the production under this contract of chloroform, did you? A. Yes.

[365] Q. Now, when they were off the production line were they on the same floor packed, cased, and ready for shipment, or were they sent some place else? A. At that time we had three floors. On our third floor we had production. We had a fourth floor that we had warehousing. On our first floor we had shipping and warehousing our finished material.

Now at that time I believe, to make room for production on the third floor, we moved it down to the first floor ready, on account of the weight so we couldn't handle too many cases, but ready for shipping at the first floor right at the dock or the shipping platform.

Q. Now, when was it in 1952, when was it that you learned that the company had received a notice of rejection of those—of the initial cases of chloroform? A. I cannot give you the exact date, but I do not know if I received it from the office or from the inspector himself, because he used to contact me at the first floor platform at times when he came in to inspect materials. So I couldn't say if it was direct from the inspector or from the office. But I know it was confirmed, if he told me originally then it was confirmed by him, because I know I heard it was—I don't

know who telephoned first, the office or the inspector—that it was rejected.

[366] Q. Now, at this time of the rejection was the material still in your plant? A. Yes, sir. It was on the first floor.

Q. It was on the first floor ready— A. For shipping out.

Q. For shipping? A. It was not ready for shipping out; it still had to be put in wooden cases and straps. It was new corrugated cartons.

Q. And there was a further operation of wooden casing and straps to be performed on the material before it would be carried or trucked out from your plant? A. That is right.

Q. Did you know—were you told why it was rejected or were you just told the material was rejected? A. No, I wasn't. I was just told it was rejected.

Q. With reference to this first lot that we are referring to, now you have it on the first floor, only one operation left—casing and strapping on the first floor—and once that is done it will be shipped. At that time with it in that condition and in that position did you observe Mr. Carey working around it or doing anything with relation to it? This is after you were notified somehow or other by somebody that there was a rejection. A. I had found Mr. Carey with a drum of chloroform in the lab [367] and I put it up there one day for him, and the next time I saw him he was pulling out some chloroform out of the drum with a sort of a long test tube, and then he took it over to the little table and he was making some kind of test on it. I don't know what happened. He had some kind of black material, substance on one side on a scale and some other material. I could not identify it.

Q. Do you work seven days a week in that plant? A. No, six days.

Q. Do you ever work on Sundays? A. I work quite often on Sundays.

Q. Well, now, could you tell us was it a Saturday or Sunday or Monday or Tuesday when it was that you noticed what you just said? A. I believe it was on a Saturday.

Q. Saturday? A. I believe it was on a Saturday.

Q. Did you see him do this often? A. You mean work around the plant?

Q. Yes. A. He has mixed different bulk materials together. I have worked with him a couple of times in another plant mixing mortuary compounds.

Mr. Packard: I move to have the answer of the witness stricken in view of the fact that it is irrelevant to the issue in this case.

[368] The Court: Motion granted.

Mr. Driscoll: If your Honor please, the issue in this case—

The Court: I know what the issue is.

Q. Did you ask him what he was doing? A. No, I didn't, because he probably would give me some technical answers and I wouldn't understand him.

Q. Did you ever meet—you say you might have worked once or twice on a Sunday—did you ever meet him on a Sunday that you did work? Did you ever meet Mr. Carey there? A. The few Sundays that I went in there I always met Mr. Carey in there.

Q. Now after this that you have described in this lot and it is on the main floor, what do you know about that lot? After that what was done with it? A. Well, when I received word from the office that they were ready to rework the material, that bulk material back to the third floor on the production line, the proper space for reworking, I moved it up there. There were quite a number of pallets

involved in it. We needed three men to push a 2,000 pound pallet, 2,000 pounds on a pallet.

Q. How many cases of that? A. That is about forty cases.

Q. So you had to move all these cases. Roughly, how many [369] cases, let us say, of this material had you on the first floor that you had to move to the third floor? A. I don't remember actually how many cases. It is quite a number. I guess, it took my men and myself almost a half day to move the material.

Q. After a half day of moving it, you had it on the third floor? A. Then we had to produce our other materials for reworking, which included some dippers, caps, empty drums. The empty drums I kept from the original filled because they were special drums, they were galvanized drums, and they were put on the side.

Q. Well, now, after all this was done, what is the next thing, of your own knowledge, that you did or did you see done with reference to this material? A. I wasn't concerned about production on the third floor. I had my own. I very seldom spent any time on the production floor. At that time when it was moved up I had four floors to take care of there.

Q. What I mean, Mr. Horvath, did you thereafter at any time get into your control or under your supervision that material that you just said you moved up there to be reworked? A. After it was reworked I received it back.

Mr. Packard: I move to have that answer stricken [370] from the record.

The Court: The answer will be stricken. You can say that it came down, but what was done after you sent the material up—you didn't see it done yourself, did you?

The Witness: No.

The Court: No.

Q. You were directed to bring the material from the third floor down to the first floor again and ready for shipment? A. Right.

Q. And you don't know what happened to it or what was done or not done with the material from the time after a half day's work with help and leaving it on the third floor? A. That is right.

Q. Do you know how long a period of time elapsed between that and the next— A. I couldn't tell because I was in the upstairs, from the fourth floor down to the first floor, from the first floor up to the second floor.

The Court: Do you recall what materials you sent up after the rejection from the loading floor to the third floor?

The Witness: Yes. Corrugated dippers, caps, jelled seals and the empty drums.

[371] The Court: Any chloroform?

The Witness: The chloroform, the rejected material was moved up from the first floor to the third floor.

The Court: In the bottles?

The Witness: In the original containers that they were made.

The Court: Yes.

Q. Now, Mr. Horvath, do you know about, or do you know whether or not there were assessments, what are called assessments, made against this shipment, one on the strapping effect, another on the corrugated shipping board, that it was defective?

Mr. Packard: I object, your Honor. It is irrelevant.

The Court: You can ask him what deviations he knew of constituting rejection by the Government of this particular contract.

Q. Do you know of any—were you told by the—were you told what the deviations were that the Government complained or made against this shipment of chloroform? A. Only to the fact on corrugated cases.

The Court: What?

The Witness: On the corrugated cases, that quality, that there wasn't 200-pound test when we ordered 200-pound test, and the cases had to be strapped. He was charged [372] for strapping.

Q. And you say— A. The Government charged Private Brands stripping, strapping the cases, and it was partly my fault due to the fact I understood all domestic cases did not have to be strapped and for export had to be strapped. These cases came in without any notation on the side, and they should have been strapped, and it was my fault that they were not strapped. I didn't give instructions to strap them.

The Court: Anything else you knew about the rejection?

The Witness: That is all.

Q. You know nothing further about deviations or other reasons for the rejection? A. No.

Q. You said you don't know anything about the production? A. No, sir.

The Court: Don't let us go over ground that has been covered in your questions.

Mr. Driscoll: That is what I am trying to avoid, your Honor.

The Court: But you don't avoid it by asking the question you just put. You must know from what he said.

Q. You have looked at Defendants' Exhibit E showing the delivery to and purchase by Private Brands of one bottle [373] chloroform USP not for anesthesia. Did you receive that bottle? A. That is right.

Q. The bottle mentioned on that? A. That is right.

Q. What did you do with it? A. I kept it in my possession until to day and I have it in that box right now. I had it under lock and key since I received it.

Q. Didn't you send in anything? A. I sent one sample to the Fisher Scientific and one to the testing lab, I forget the name of it now.

Q. Bendiner & Schlesinger? A. Bendiner & Schlesinger, and took this sample myself in the test prior and mailed it out—those two bottles.

Q. And the balance— A. And the balance I have there.

Q. Did you receive instructions from Mr. Carey with reference to these bottles? A. He told me not to leave them out of my possession.

Q. You are the only one that has a key or has in your possession. Where do you say you put that under lock and key? A. I have a small room in the back of my office we just store alcohol in. I have two keys. Only one that is used 90 per cent of the time. The other one is locked up in the office.

Q. Is there anybody other than you that could get in that [374] room and get that? A. Unless they contacted Miss Hazard. She has the other key under her—

Q. Mr. Carey does not? A. No, sir.

Q. Would you open that case?

Mr. Driscoll: If your Honor, pleases, I am about to have the witness to open the case showing we had this bottle and to ask him to look at the bottle contents and tell me whether or not there is any sediment or flaky things.

Mr. Packard: If your Honor please, at this time I request that counsel's remarks be stricken form

the record, and if I may respectfully say so, your Honor, I believe Mr. Driscoll has been giving testimony on several occasions, and I don't believe it is proper.

The Court: There has been very little testimony given that I recall.

Mr. Packard: May I have the question, please? I have forgotten.

(Question read by the reporter.)

Mr. Packard: I don't believe that is really a question, but I object to the proposed procedure on the part of the witness.

The Court: He hasn't been qualified as one who [375] could respond to a question of that sort. It is a technical question.

Mr. Driscoll: If your Honor pleases—

The Court: I will sustain the objection.

Mr. Driscoll: It is not technical.

The Court: If there is a question, if you are going to ask him—

Mr. Driscoll: I am going to ask the question. I have not put the question.

The Court: Put your question.

Q. Mr. Horvath, will you take that bottle—is it one or two? Does it have on it Chloroform USP not for anesthesia, on the label?

The Court: It isn't in evidence, so how can he be permitted to read what is on the label?

Mr. Driscoll: This is in evidence, a bottle of chloroform USP not for anesthesia.

The Court: I beg your pardon.

Mr. Driscoll: This invoice is.

The Court: The invoice is in evidence, but that package is not in evidence.

Mr. Driscoll: No, your Honor.

The Court: Offer the package if you want to have the witness talk about what is on the label on a bottle.

[376] Q. Is that the bottle? Does that represent the bottle referred to in this exhibit produced from the Scientific? A. Scientific? Not from the Scientific. That was Merck. Do I have marked Merck on that receipt?

Q. I don't know. You better look at it. A. The only way I can identify it is from the receipt on the back. I initial it there "Received" to go with my receipt here. My initial in there. The only way I can identify it.

Q. Will you state after looking at that bottle that that bottle is the merchandise represented in that invoice which is in evidence? A. I do.

The Court: Well, what is next?

Mr. Driscoll: I am sorry, I was waiting for an answer. What is the answer?

(The answer was repeated by the reporter: "I do.")

Q. Oh, you do? A. Yes.

Mr. Driscoll: I offer this in evidence.

Mr. Packard: If your Honor pleases, this is Merck again. The date is January 7, 1955. It says "Merck USP." In this case we are concerned about technical chloroform which Private Brands purchased from du Pont in 1952. I object to the offer.

The Court: The invoice, Exhibit E—let me have it [377] —refers to Scientific Glass Apparatus Company, Inc., and nothing about Merck.

Mr. Driscoll: That is right, your Honor.

The Court: I sustain the objection.

Mr. Driscoll: They do not sell everything Merck. They sell du Pont. They sell Merck. They sell various manufacturers. They just sell it.

The Court: I sustain the objection.

Mr. Driscoll: Will you mark this. I would like to offer this to be marked for identification.

The Court: Yes. If you produce other evidence to connect with the sample received the statement that the invoice of Exhibit E accurately describes what is in that bottle and call representatives from the Fisher people to prove that, then I will consider the offer of this Exhibit F for identification in evidence.

The Clerk: Defendants' Exhibit F for identification.

(Sample marked Defendants' Exhibit F for identification.)

Mr. Driscoll: That is all, Mr. Horvath.

Mr. Packard: No cross.

(Witness excused.)

Mr. Driscoll: Mr. Swift.

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[378] ARTHUR THOMAS SWIFT, called as a witness in behalf of the defendants, having been first duly sworn, testified as follows:

Direct examination by Mr. Driscoll:

Q. Mr. Swift, what is your occupation? A. I am assistant secretary.

Q. Of what? A. Of Private Brands, Inc.

Q. When did you enter the employ of Private Brands? A. In 1951.

Q. And what did your duties in 1952 consist of? A. I do practically all the accounting of the corporation.

Q. You do all the what? A. Accounting—bookkeeping and statistical statements.

Q. Did you ever act in 1952 as a purchasing agent for procurement? A. I was at that time.

Q. That is, Mr. Swift, what I would like to know—what you did in January, February and March in 1952. A. I purchased all the material for the contract in question.

Q. And in the course of your business and employ was it necessary or did you consult with Mr. Carey about making bids on contracts? A. At that time I was very green and I consulted with Mr. Carey, yes.

Q. Then you procured materials that a contract was made [379] up of and talked with Mr. Carey? A. Exactly.

Q. Do you remember a proposal by Mr. Shoenberger? A. I remember presenting an order for bottles with that gentleman, yes.

Q. Then you placed an order for PBI with that gentleman, yes.

Q. For bottles? A. For bottles in the reshippers.

Q. Were those bottles used in the carrying out of this Government contract for chloroform? A. They were.

Q. Now, what was the proposal of Mr. Shoenberger with reference to the purchase of these bottles? A. He suggested that we might use C carton instead of A carton.

Mr. Packard: I object to this answer, your Honor. It is hearsay.

The Court: I don't know who Shoenberger is.

Q. Is this a conference between you, Mr. Shoenberger and Mr. Carey? A. No. Between Mr. Shoenberger and I.

Q. Between you and Mr. Shoenberger? A. Yes.

Q. Will you tell me what you discussed? You were the procurement or purchasing agent, you said, for Private

Brands, [380] Inc., so you discussed with Mr. Shoenberger purchases of bottles? A. That is right.

The Court: Who is Shoenberger?

Mr. Driscoll: A seller.

The Court: I am asking the witness.

The Witness: He was the agent for the supplier of the bottles.

The Court: Who was the supplier?

The Witness: The Farman Glass Works, if I remember rightly.

Q. And that last name are the people that PBI bought bottles from? A. As far as I remember.

Q. Did you know that there were assessments made by the Government against Private Brands, Inc., with reference to the boxes and padding of the bottles of chloroform on this contract?

Mr. Packard: I object, your Honor, to the form of the question.

The Court: Overruled.

Mr. Packard: I withdraw it.

Q. In your capacity as purchasing agent, were any complaints or assessments made against Private Brands, Inc., to your knowledge? [381] A. That was not my direct concern.

Q. Did you in your capacity as purchasing agent have anything to do with or would you have any knowledge of whether or not assessments were paid? A. Whether or not what?

Q. With the payment of assessments. A. In my other capacity of accountant, I knew about the paying of assessments.

Q. In other words, you were in a dual capacity at this time—you were purchasing agent, you were also accountant? A. I do bookkeeping as well as purchasing.

Q. Well, then, as a bookkeeper, in the capacity of bookkeeper were you notified, did you receive advice that an assessment of so much was made against Private Brands, Inc.— A. Yes.

Q. (Continuing) —on this contract?

Mr. Packard: I object, your Honor.

The Court: I sustain the objection.

Q. Did you purchase packing, casing, board casing that makes up the boxes to contain these— A. All the components, yes.

Q. What is that? A. I bought all the components.

Q. Do you recollect what the specification was? A. Yes. I had to state the specification before I bought it.

Q. What was it? [382] A. In which particular component?

Q. The boarding, the box boarding. A. The outside wooden case I believe was—there is a style A or a style 1-2. As soon as I knew I put in the coating specification.

Q. Is there a specification with regard to test board—a certain test? A. There is an inside carton.

Q. Well, is there a specification with regard to test board? A. Yes. It specifies between partitions a 200 pound test.

Q. And in the capacity of the accountant for the firm, would you tell me what the total cost to Private Brands was on this, in this initial operation? A. I have statistics that would tell me. I don't remember the total in my head.

Q. If I showed you the corporation reports could you tell me? A. Yes.

Q. I show you some sheets. Are they production reports? A. They are profit and loss statements.

Q. All right, from those. Are they records of the company? Look at them. A. They are.

Q. Can you swear that they are the PBI records?

The Court: He said so.

[383] A. Everything from 1952 is in my handwriting.

Mr. Driscoll: I will offer those in evidence.

Mr. Packard: If your Honor please, these statements of profit and loss, as they appear to me, do not appear to relate to the months in which the processing of the contract in question took place. So, unless some foundation is laid, I object to it.

Mr. Driscoll: If your Honor please, they do.

Mr. Packard: They are irrelevant.

Mr. Driscoll: Mr. Packard, I point out to you they are February, March, April. The contracts have been put in evidence and testified to, the original contract for 25,000 in January and February and extension thereof two months later. That would make it March and April.

Mr. Packard: The point to which Mr. Driscoll is pointing says December 1952 right on it.

Mr. Driscoll: What does that say—April 1952.

Mr. Packard: If it is connected with the particular contract.

The Court: Let it go in. As a matter of fact, wholly independent of that question, it makes no difference whether the defendant corporation here made money or lost money on this contract.

Mr. Packard: I withdraw the objection, your Honor.

[384] The Court: But we will receive them, if you are offering them. You have not offered them yet, have you?

Mr. Driscoll: I have offered them and he objects to them.

The Court: You didn't offer them for the record.

Mr. Driscoll: For him to look at for objection purposes.

I offer them in evidence.

(Statements referred to are marked Defendants' Exhibits G, H, I, J, K, respectively, in evidence.)

The Court: Can you proceed a little more promptly.

Mr. Driscoll: Yes, your Honor. I am eliminating most of these questions.

That is all, your Honor.

The Court: Any cross-examination?

Mr. Packard: No cross.

(Witness excused.)

The Court: We will take an adjournment now until tomorrow morning at 10:30.

(Thereupon the trial was adjourned to February 4, 1955, at 10:30 a. m.)

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[385] Brooklyn, New York,
February 4, 1955.

Appearances:

(As heretofore noted.)

TRIAL CONTINUED.

Mr. Driscoll: Mr. Horvath.

LOUIS E. HORVATH, recalled as a witness on behalf of the defendants, having been previously sworn, testified as follows:

Direct examination by Mr. Driscoll:

Q. Now, Mr. Horvath, on or about April 10 or April 11, 1952, did you take a sample of the chloroform which had

been processed and sealed with a sealable enclosure, which was part of the fulfillment of the contract at that time, and send it to Bendiner & Schlesinger, an outside chemist house, for a test? A. I did.

Q. Did you send that at that time to Bendiner & Schlesinger— A. That is right.

Q. For an analytical report? [386] A. And testing.

Q. How did you send that to Bendiner & Schlesinger? A. I don't remember whether it went out by mail, by special messenger, or precisely how.

Q. Do you know of your own knowledge or from the records of the Private Brands, Inc., business records whether or not that was received by Bendiner—those two different bottles were received?

Mr. Packard: I object to that question, your Honor. The records will be the best evidence.

The Court: I will overrule the objection. Do you know whether they were received?

The Witness: I have no record of any notice that comes in the office that it was received. It is an office record. I have no control over that.

Mr. Driscoll: That is all, Mr. Horvath.

Mr. Packard: No cross.

Mr. Driscoll: I am sorry, your Honor. Mr. Horvath.

Louis E. Horvath—for Defendants—Recalled—Cross

LOUIS E. HORVATH, recalled:

Direct examination by Mr. Driscoll:

Q. That second bottle that I referred to, on or about or the early part of April 1953, in addition to that bottle, as testified to, did you send also to Bendiner & Schlesinger just [387] those sealable enclosures—let us call it the cap. A. The caps with sealable enclosures, and also a little bottle of Filmoseal glue.

Q. Which material was— A. Was part of—

Q. Was not on any bottle? A. That is right.

Mr. Driscoll: Thank you. That is all.

Mr. Packard: I have one question.

Cross-examination by Mr. Packard:

Q. Do you know whether the bottles which you say you sent to Bendiner & Schlesinger contained USP grade chloroform or technical grade chloroform?

Mr. Driscoll: I object, if your Honor pleases. He is not a chemist. He just had a bottle.

The Court: I will overrule the objection.

A. I wouldn't know what was in the bottle. Only that is—

The Court: All right, you don't know.

Mr. Packard: No further questions.

(Witness excused.)

Mr. Driscoll: Mr. Bechtoldt.

[318] WILLIAM BECHTOLDT, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct examination by Mr. Driscoll:

Q. Now, Mr. Bechtoldt, are you a chemist? A. Yes, sir.

Q. Succinctly, in a few words, will you kindly tell us your background, your educational background? How long have you been a practicing chemist? A. Well, I was with Bendiner & Schlesinger doing analystical work for 30 years. I attended and graduated from the Institute of Chemistry, the School of Chemistry, and from Columbia University, and also took postgraduate courses in Polytechnic Institute, Brooklyn.

Q. Now, you say you did analytical chemical work, chemical analytical work for Bendiner & Schlesinger. Now, were you in their employ on or about the 10th, the early part of April 1952? A. Yes, sir.

Q. Doing that type of work? A. Yes, sir.

Q. Did you receive—do you recall receiving from Private Brands on or about that time a bottle of chloroform with a cap and seal on the bottle? A. Yes, I recollect receiving the sample.

Q. Did you test—were you requested by Private Brands, [389] Inc., to chemically analyze the bottle contents and advise by report to Private Brands, Inc., what you found with reference to the bottle and cap? A. If my memory is correct, I tested it according to the USP. That is the United States Pharmacopeia.

Q. You did do it. I show you a paper and ask you if that is the report you forwarded to Private Brands, Inc., after the analytical laboratory test was made of that bottle? A. It is.

Mr. Driscoll: I offer it in evidence.

Mr. Packard: Well, this paper, your Honor, I respectfully submit there has been no proper foundation laid to connect it with anything in the case. There has been no evidence that the chloroform allegedly covered by this paper met USP standards, and therefore I object to its admission.

The Court: Let me look at it.

Mr. Driscoll: If your Honor pleases—

The Court: I will receive it, Mr. Driscoll, subject to connection. The witness who said that he sent samples, first on April 10th and then later in the year, to Bendiner & Schlesinger didn't make sufficient identification with the samples that were thus sent and the chloroform which the contract with the Government called for.

[390] I will receive it subject to connection.

Mr. Driscoll: If you care to, Judge, I will put him on right now and have him identify.

The Court: Who?

Mr. Driscoll: Mr. Horvath.

The Court: He said he didn't know, he is not a chemist.

Mr. Driscoll: He sent a bottle out of the samples which were shipped.

The Court: The Government isn't contending that the bottle which was delivered by Horvath isn't the bottle that Mr. Bechtoldt has analyzed. That is not the point.

Mr. Driscoll: That is right.

The Court: But the connecting legal point has to be established that that sample which Mr. Bechtoldt analyzed and which is covered in this report is or was prepared in the same way and of the same substances as called for under the contract with the Government.

The Clerk: Defendants' Exhibit L.

Louis E. Horvath—for Defendants—Recalled—Direct

(Report referred to is marked Defendants' Exhibit L in evidence.)

Q. Mr. Bechtoldt, I give you that report and would you tell me what you found when you analytically tested that bottle?

Mr. Packard: I object.

[391] The Court: It is set forth in the report?

Q. Set forth in the report.

Mr. Packard: I object, your Honor, to the witness testifying on the report until such time as it has been connected.

The Court: Yes, I will sustain that objection.

Mr. Driscoll: If your Honor pleases, I would like to withdraw him and put on the other witness to identify that that was the bottle that he sent, was one of the bottles that had been sold and were there to be shipped to the Government.

The Court: Well, you may do that.

Mr. Driscoll: Contract No. so-and-so. I asked him if it was one of the bottles that they sold to the Government and he said yes.

The Court: I don't know about that.

(Witness temporarily excused.)

Mr. Driscoll: Mr. Horvath.

LOUIS E. HORVATH, recalled, testified as follows:

Direct examination by Mr. Driscoll:

Q. Now, Mr. Horvath, you were in charge of eevrything. Previously you have testified you were in charge of in that [392] plant of Private Brands, Inc., everything but

the chemistry and putting it in the bottle; is that right? A. That is right, sir.

Q. Now, this bottle that you sent, that you testified to as to having sent to Bendiner & Schlesinger, did it have a label on it? A. Yes, sir.

Q. What did the label indicate? A. Chloroform.

Q. Did it have a lot number? A. It had a lot number.

Q. What was the lot number? A. I don't remember the numbers—the lot number.

Q. Well, was it a lot number which was the same as the lot number of all those bottles? Was it picked out of the case of bottles, the certain lot number that as far as you knew had been sold and was to be shipped or had been shipped to the Government? A. That is right. It was taken—

> Mr. Packard: I object, your Honor. It is highly leading.
>
> The Court: Yes, I sustain the objection. Strike out the answer.

Q. You don't remember—and do you remember what was on the label of that bottle that you sent to Bendiner & Schlesinger? [393] A. It says chloroform USP, fiber manufactured, packed by Private Brands. There is a date on there and there was a lot number on there.

Q. But you don't remember the lot number? A. I don't remember the lot number.

Q. But you do remember— A. I do remember taking it out of the case.

Q. What was on the—were there any markings on the case out of which you took this one bottle with reference to what was in the case, a lot number, a restriction of the contents of the case? A. There is a label put on each case. The same kind that is put on that bottle is put on the outside of each case.

Q. Could you tell me what that label said on the outside of the case? A. The label read the same as the bottle label.

Q. Did it have a lot number on it? A. It did have a lot number.

Q. What was it? A. I don't know the lot number.

Q. Was it—

The Court: Now, don't lead.

Mr. Driscoll: That is all, your Honor.

The Court: That is all, Mr. Horvath.

Mr. Packard: No cross.

(Witness excused.)

[394] Mr. Driscoll: If your Honor pleases, may I now question the chemist?

The Court: You may call him back to the stand, if you want, but if you are going to ask him about this Exhibit L, there is no proof sufficient to warrant the jury in finding that Exhibit L was a bottle that was one of a shipment similar to that sent to the Government.

Mr. Driscoll: Your Honor—

The Court: You can do as you please. You can ask him the questions. That will be my ruling.

Mr. Driscoll: If that is so, your Honor, I do not wish to recall Mr. Bechtoldt.

(Mr. Driscoll confers with Mr. Carey.)

Mr. Driscoll: If your Honor pleases, I would like to recall Mr. Bechtoldt to the stand to ask him another question.

The Court: Mr. Bechtoldt:

William Bechtoldt—for Defendants—Recalled—Direct

WILLIAM BECHTOLDT, recalled.

Direct examination by Mr. Driscoll:

Q. Now, Mr. Bechtoldt, suppose a case in which it was testified to, or these facts were testified to, an order was made by one party, one party ordered from another party chloroform, USP not for anesthesia. Suppose the order also contained [395] a provision for certain type of seal or capping known as Gutmann's Sealable Enclosure. And suppose that a bottle containing contents, those contents being enclosed by a Gutmann's Sealable Enclosure with a label thereon stating as to the contents USP chloroform not for anesthesia. And suppose it was testified to that the Gutmann Sealable Enclosure when used to enclose the contents of that bottle being property effects in the production line procedure, might result in some of the adhesive glue which was part of the sealing enclosure, might come in contact with the contents of that bottle, the contents being chloroform.

I ask you, as an expert chemist, would such contact of the chloroform in that bottle with the adhesive glue of the sealable enclosure or cap affect the contents of that bottle?

Mr. Packard: I object, your Honor. The question contains a great deal of conjecture not resting on the evidence in the case, and in one instance it contains a highly incorrect characterization of the evidence. There is nothing in the contract or in the testimony which says Gutmann's seal is required.

The Court: I don't recall that the contract calls for that. That is a matter—

Mr. Driscoll: I am in error perhaps on that. It specified a—

[396] The Court: Just a moment. The sealing of the bottle is a matter for the contractor to determine.

Mr. Driscoll: The type of seal was specified, your Honor, as I recollect it, in the contract.

The Court: Will you read it?

Mr. Driscoll: As I understand it, your Honor, it is a part of the specification, a certain type.

The Court: Well, just read what I have asked you to read from the contract.

Mr. Driscoll: The Government Exhibit 5 in evidence, which is the photostatic copy of the contract No. 36603.

The Court: You are reading from Exhibit 5. Now read the passage about the cap and sealing.

Mr. Driscoll: All right. It has this specification under "General Characteristics:"

(Reading): "Each bottle shall be securely stoppered with a metal, continuous thread screw cap, properly cushioned, and having a liner impervious to the contents. The metal caps shall be coated inside and outside in a manner to prevent corrosion. The cap liner shall be cork or composition cork not less than 1/16 inch thick, faced with tinfoil not less than 0.0015 inch thick. In addition to the above, each bottle shall have an inner seal to cover and adhere to the mouth of the bottle. Inner [397] seal shall be impervious to the contents."

Q. Now in the question, if that type—well, some refer to it as a cap and what that said in the question—instead of using the word Gutmann sealable or anything, if the bottle was sealed pursuant to that specification—

The Court: And the contents imprevious to the cap.

Mr. Driscoll: The inner seal shall be impervious to the contents.

The Court: Now, what is your question?

Q. The question is, if the contents of that bottle so enclosed came in contact with that—that we just described—would that contact result in a chemical change of some sort in the contents called alcohol in this case?

Mr. Packard: I make the same objection, your Honor.

The Court: Sustained.

Q. Mr. Bechtoldt, in your years of experience as a chemist you have done work or worked upon chloroform, have you not? A. I have.

Q. Or have you? A. I have.

Q. Are there types of chloroform? A. Yes, there are.

Q. What are the types of chloroform in your knowledge? A. Well, some are referred to as the reagent grade, technical grade, USP grade.

[398] Q. Now I ask you, as an expert with knowledge of these grades, is it not—would technical chloroform, for instance, pass a USP chloroform test?

Mr. Packard: I object, your Honor, unless it is somehow connected to the technical chloroform in issue in the case.

The Court: Yes, I sustain the objection.

Q. Well, Mr. Bechtoldt, if I told you that there was some testimony that these were the facts, that a party bought technical chloroform, that is all, just technical chloroform—

The Court: From a particular source.

Q. (Continuing) —from the du Pont Company—

The Court: Yes, that is better.

Q. (Continuing) From the du Pont Company, would the du Pont Company technical pass USP test?

Mr. Packard: I object, your Honor.

The Court: He is an expert. He can answer that, if he knows.

A. The technical grade has certain limitations just like the USP, like the United States Pharmacopeia. It allows for no impurities in excess of three thousandths of a per cent, which would be as a residue in every 100 grams or evaporated three thousandths of a per cent. That is the limit, it might be less, to come within the range of the USP. It might pass on every [399] test, including the readily carbonizable substances. It might pass all those tests, and hence pass as a USP article.

Q. In your experience as a chemist have you run across such an instance? A. I have run across cases where a technical grade of a substance met any—

Q. I mean with reference to chloroform only. A. Yes, I have come across chloroform such as that.

Q. Now, Mr. Bechtoldt, there has been testimony as to the procedure under the pharmaceutical bible, the Pharmacopeia, as to how you test chloroform for it to pass a designation called USP. A. Correct.

Q. There are several steps, and one of the steps was with reference to specific gravity—I believe that is it, correct me if I am wrong—where it was shown that the specific gravity of chloroform in order to pass USP tests must be between a minimum and maximum, and the minimum and maximum, as I recollect it, was minimum 1.474, maximum 1.478.

Now if the chloroform—be it technical, designated technical or USP—on testing shows specific gravity of 1.479 or 1.480, does that fail to pass as a USP chloroform? A. Well, it might be that you have made a slight experimental error in determining it.

[400] The Court: That is not the question at all.

Mr. Packard: I move to strike the answer.

The Court: You were given a categorical question and you must be guided by what the USP regulations say in answering that question.

A. Well, if it is over the limit such as 1.479, was it that you said?

Q. Yes. A. It would not be USP as far as specific gravity is concerned.

Q. As an experienced chemist—

The Court: Just put the question now. We know all about his qualifications.

Q. Have you ever known of a case in which chloroform was sold as USP wherein the specific gravity was 1.479?

Mr. Packard: I object, your Honor.

The Court: Sustained.

Mr. Driscoll: That is all for Mr. Bechtoldt.

Mr. Packard: No cross.

The Court: That is all.

(Witness excused.)

Mr. Driscoll: The defendants rest, if your Honor please.

Mr. Packard: The Government rests, your Honor.

The Court: You may sum up, Mr. Driscoll.

[401] Mr. Driscoll: May I have a glass of water before I start?

The Court: We will give you a five-minute recess.

Mr. Driscoll: All right, thank you.

(Short release.)

Mr. Driscoll: Might I say, Judge, that we haven't answered on that thing we discussed in chambers, that release.

The Court: I thought you rested.

Mr. Driscoll: I rested, I presume, I don't know. I am helpless. I don't know whether I am going to get it or I am not going to get it. I don't want to delay things.

The Court: It is up to you. I assume that you made the decision that you rested.

Mr. Driscoll: Should I ask Mr. Packard if that man has gotten—

Mr. Packard: If your Honor please, Mr. Driscoll asked me about that report and it has not come in yet. As your Honor knows, everything possible is being done to secure—

The Court: Well, Mr. Driscoll said he rested, and he said the defendants rest. I assume that that meant he was not going further. Is that your position?

[402] Mr. Driscoll: No, your Honor. I would like to get the word as to whether I can or cannot use that before I close out and sum up.

The Court: Then we will have to sit around and wait for the return.

The jury, have you any way—

Mr. Driscoll: I am perfectly willing, your Honor, to wait, let us say, a reasonable time. I don't want to wait all day and delay the case, to be quite frank with you.

The Court: If we take an adjournment, it will have to be until a quarter after two, because I have a calendar call at 2 o'clock.

Mr. Driscoll: All right, then we take an adjournment until a quarter after two, and if we have no word I am going to close out and sum up.

The Court: All right, we will declare a recess until a quarter after two.

(Recess to 2:15 p. m.)

Colloquy

[403] AFTERNOON SESSION

Mr. Driscoll: Could we approach the bench, your Honor?

(Side bar conference with Mr. Packard, Mr. Driscoll and one other party.)

(Jury convenes at 2:25 p. m.)

(Mr. Driscoll summed up on behalf of the defendants.)

(Mr. Packard summed up on behalf of the Government.)

The Court: Members of the jury, the afternoon has advanced so far, this being a Friday, that I hesitate to charge you at this time. Accordingly, we will take an adjournment now until Monday, February 7th, at 10:30 in the morning.

Again, let me say not to discuss this subject with anybody, nor even among yourselves, until you have retired to the jury room after the charge.

(Adjourned to Monday, February 7, 1955, 10:30 a. m.)

[404] Brooklyn, New York,
February 7, 1955.

Appearances:

(As heretofore noted.)

(Trial resumed at 10:30 a. m., whereupon the Court charged the jury as follows:)

The Court's Charge

[405] (Galston, J.)

The Court: Members of the jury, we now reach that stage of this trial at which it becomes my duty to charge you on the law of the case and to say a word or two about the evidence. You will recall that at the outset of the term I explained to all members of the panel that an indictment is a charge and in and of itself is no proof of the matters charged.

Now, this indictment charges the commission of a crime in that the two defendants, the corporation and its president, are charged with violating a section of the Federal Statutes. I will read the section which is charged to have been violated by these defendants:

> "Whoever in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by any trick, scheme or device a material fact or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be—"

And then this statute concludes with the statement of the punishment which may be imposed. That part of the

[406] section is solely for the consideration of the Court, in the event that guilt is found, but I have read you that section which relates to the nature of the crime alleged to have been committed by the defendants.

Both defendants pleaded not guilty and thus the issue arose which is before you—are they guilty or are they not guilty.

Now the burden of proving guilt is upon the Government, and that burden consists of proving the guilt beyond a reasonable doubt.

The phrase "beyond a reasonable doubt" should not give you any difficulty. You recall that your oath requires you to determine the issue on the basis of the evidence, and that of course means that you must exclude from the consideration of your deliberations any bias or prejudice or prepossession or any emotion. In other words, you must use your reason, and so when we say that the proof offered by the Government must be that which is beyond a reasonable doubt we mean such a doubt as might arise from the application of your reason but not of your emotions.

Now in respect to the individual defendant Carey, there was some evidence given about character, and that, too, you may consider together with all the other evidence [407] in the case in determining the matter of reasonable doubt.

Now a word about what is meant by the term "evidence." The evidence in a case is made up of two parts—one, what the witnesses in the case tell you; two, the exhibits that have been offered in evidence. Those two classes make up what we refer to as the evidence in the case.

Now you as jurors exercise some exclusive prerogatives. One, you pass on the facts, you determine the facts, and neither what counsel may have said in their summations in respect to their understanding of the facts, nor indeed what I may say in my charge concerning what the evidence is, need conclude you. You are the sole judges of the facts.

Secondly, you also pass upon the credibility of witnesses. Now there isn't any rule of law which I can offer you in order to enable you to pass on the credibility of witnesses. I can make suggestions in respect to those processes that we in the ordinary walks of life use in determining whether our fellows are telling the truth. What is the appearance of the witness? What is the consistency of his story? What is his motive? And are there inconsistent statements made by the witnesses? If you find that any witness has testified wilfully and falsely as to a material fact, you should disregard such [408] false testimony, and indeed you may disregard any and all testimony given by such witness. In the last analysis, in exercising this second exclusive prerogative—that is passing on credibility—I suppose what you will do is what we do in the normal course of life: We use our common sense.

Well, now, what is this case about? The indictment contains 21 counts. That need not alarm you, even though you have to pass in your verdict on each one of the counts, because they all stem from the contract which was made between the defendant and the agency of the Government which is known as the Armed Services Medical Procurement Agency. And I say all of these counts stem from that contract.

I read portions of typical counts for your aid and understanding.

Count 1 says that at all times thereinafter mentioned Private Brands and the defendant Francis P. Carey, who was its president, had its principal place of business in Clifton, New Jersey; that the function of the Agency was to purchase medical supplies, drugs and pharmaceutical compounds on behalf of the Armed Services and the Veterans Administration; that on or about December 26, 1951, the Agency and Private Brands, Inc., by Francis P. Carey, its president, entered into a contract, identified [409] under the Agency's office identification—the number was given

whereby Private Brands, as the contractor, agreed for a monetary consideration of nine thousand-odd dollars to furnish and deliver to such destinations as should subsequently be designated by the Government 25,824 bottles of chloroform, such chloroform to be in accordance with the following prescribed standard: Chloroform, 4 lb.: USP; do not use for anesthesia. Now that is a critical provision of the contract.

This first count continues: That on or about April 19, 1952, within the Eastern District of New York, the defendants, Private Brands, Inc., the contractor, and Francis P. Carey, its president, did knowingly and wilfully use a false statement, to wit, a bill of defendant, Private Brands Inc., dated April 15, 1952, in that they submitted and caused to be submitted the said bill to the Agency for payment, said defendants knowing the said document to contain a false and fraudulent entry, to wit, that there was being shipped under the said contract—and the number given—to Atlanta General Depot, United States Army, Atlanta Georgia, 2,880 bottles of "chloroform 4 lb. USP; do not use for anesthesia", and to contain a false and fraudulent statement in the name of the defendant Private Brands, Inc., subscribed by the [410] defendant, Francis P. Carey, as president, reading as follows:

> "I certify that the above bill is correct and just and that payment therefor has not been received.
>
> "Private Brands, Inc.
> "(Signed) F. P. Carey
> "F. P. Carey—President."

That said entry and said statement were false and fraudulent, as the defendants then and there well knew, in that the said 2,880 bottles of chloroform identified in said bill did not constitute chloroform of USP quality, but constituted chloroform of a quality other than USP quality chloroform.

Now that Count No. 1 is substantially repeated in Counts 2, 3, 4 and 5, the difference merely being with reference to different stations. For example, Count 2 refers to delivery to the Louisville Medical Depot. Count 3 refers to a delivery to the St. Louis Medical Depot. Count 4 to a delivery to the Alameda Medical Depot. And Count 5 to the General Depot at Schenectady. And of course the dates are different and the quantity is different.

So the first five counts all relate to this delivery of chloroform and certification by the president for the company under the charge that it was known by them [411] that that was a false claim.

Now we come to Count 6, which I will read as a typical claim of some of the few claims that follow: That on April 19, 1952, Private Brands, Inc., the contractor, and Francis P. Carey, its president, did knowingly and wilfully conceal by a device a material fact, in that they submitted and caused to be submitted to the Agency for payment a bill of defendant Private Brands, Inc., in which it was stated that there had been shipped under the said Contract Number 36603 to Atlanta General Depot, United States Army, Atlanta, Georgia, 2,880 bottles of chloroform identified by the contractor's lot number 2081, which lot number had been assigned by the contractor.

That the material fact concealed by the defendants was that such chloroform so identified in truth and in fact, as the defendants then and there well knew, constituted a portion of a lot of chloroform identified by the contractor's Lot Number 2049, which lot, on the basis of samples which previously had been selected therefrom and had been analyzed by the Agency laboratory, had been rejected by the Agency for failure to conform to some of the specifications for USP quality chloroform.

That the device used to conceal the above-mentioned [412] material fact was the submission by the defendants to the Agency on or about April 19, 1952, of said bill dated

April 15, 1952, wherein it was stated that there had been shipped under said contract number to the Atlanta Depot bottles of chloroform, which chloroform was identified in said bill by the contractor's Lot Number 2081, when, in truth and in fact, as the defendants then and there well knew, the chloroform referred to in said bill comprised a portion of the lot of chloroform cotained in the 25,824 bottles, more or less, identified by the contractor's Lot Number 2049, which lot had been rejected by the agency for failure to conform to some of the specifications for USP quality chloroform.

That then is, you will recall, the method which is charged to have been violated by the defendants to cover up the No. 2049 on the original label by giving a new label and, as alleged by the Government in this case, constitutes additional evidence of the fact that this section of the statute that I read to you had been knowingly violated by the defendants.

Now that related to a shipment to Atlanta under the label 2081.

Count 7 is substantially the same as Count 6, except that it refers to a shipment to the Louisville Medical [413] Depot.

Count 8 is the same as Count 6, except it alleges shipment to the St. Louis Medical Depot.

Count 9 also is the same as Count 6, except that it alleges shipment to the Alameda Medical Depot.

Count 10 is likewise in that same category, alleging shipment to the General Depot at Schenectady of the United States Army.

Now in all of these bills that were submitted for payment similar certification is given as that which I read to you in reading from Count 1.

Now we come to Counts 11, 12, 13, 14, 15, 16, 17, 18 and 19, and here we have counts which allege the same violation as that which is set forth in Count 1 but the order num-

ber in this case is different, though the contract is the same contract, because these counts relate to the option which the Government had exercised, you recall, for additional purchases, and that option had been exercised by the Government before, of course, it was known that these defects had not been corrected by the defendants.

So there you have the 21 counts.

And now, generally speaking, what does the evidence in the case disclose? Well, after introducing the contract [414] and a number of other exhibits in the case, there was called a witness to the stand by the Government, Philip R. Hendrixson, who is a chemist employed by DuPont, and he testified, as appears in the case as I recall, that the purchases made by the defendants for the fulfilment of this contract with the Agency were not of chloroform USP but of technical chloroform, and when the samples were analyzed which had been sent to the Agency by the Government it was found that there were important deviations which led the Agency to reject the material that had been made in accordance with those samples, and the Government called Hendrixson to explain the difference between chloroform USP and chloroform technical, DuPont having been the source of supply, as I recall, to the defendants on the purchase by the defendants of the material for fulfilment of this Government contract.

Now Mr. Hendrixson was asked:

> "Q. What is meant by chloroform of USP quality? A. That designation is chloroform which meets all of the specifications listed in the U. S. Pharmacopeia.
>
> "Q. And in order to be entitled USP chloroform, does it have to meet each and every one of the specifications in the Pharmacopeia? [415] A. Yes.
>
> "Q. Does DuPont manufacture USP chloroform? A. Not now.

"Q. Did it used to manufacture USP chloroform? A. We did, yes.

"Q. And on what date or approximate date did DuPont discontinue the manufacture of USP chloroform? A. It was early in the year of 1951."

Now it skips some questions.

"Q. So that in 1952 the specifications for technical DuPont chloroform were the same as they are today; is that correct? A. That is right.

"Q. Now, do DuPont's specifications for technical chloroform differ in any respect from specifications for USP chloroform set forth in the Pharmacopeia? Yes, they do.

"Q. And could you tell me in what respects they differ? A. Well, the differences include the specific gravity, that is the weight of the material, and the type of stabilizer that must be used, what produces on a test with sulfuric acid to show discoloration, and there are some tests in the U. S. Pharmacopeia for [416] chloroform that are not in any way included in the technical DuPont.

"Q. So that DuPont technical does not purport to meet those specifications that are set forth in the USP, the last one you mentioned? A. No, sir.

"Q. Now, speaking of this stabilizer you mentioned, Mr. Hendrixson, what is the function of the stabilizer in chloroform? A. A stabilizer protects the material against the adverse effect of light, heat and air. In other words, things that might tend to decompose it.

"Q. And do the specifications for USP chloroform set forth a specific stabilizer? A. Yes."

Then he was asked what the stabilizer was in USP and he answered "Ethyl alcohol."

"Q. What is the stabilizer in DuPont technical chloroform? A. Amylene."

Skipping along:

"Q. And, Mr. Hendrixson, did the price which DuPont used to charge for USP chloroform, was that different from the price which it used to charge for [417] technical chloroform? A. Yes. It was greater.

"Q. Was it substantially greater? A. Yes, it was. It was quite a lot greater."

Now I don't think it is necessary to review all of the evidence in the case or anything more beyond saying that, so far as I know, there was no proof that the bottles of chloroform which made up the Lot 2049, that the contents were ever reworked. There is some evidence of a visit by an FBI agent to the plant of the defendant and his conferences with Ehrlich and Carpinelli and at that interview they told the FBI man that there had been reworking of those bottles, but on the stand here Ehrlich testified that he was told to say that to the FBI agent by Carey, and Carpinelli said that he was told to say that by Ehrlich.

Well, there, ladies and gentlemen of the jury, you have the story in outline.

Something has been said to you about a civil liability. You are not to concern yourselves with that at all. Mr. Foreman and members of the jury, the question for you is whether there has been a violation of the Federal [418] Statute, the section of which I read, by the corporation and/or the defendant Carey.

Now before you retire I will ask counsel to step to the bench for a moment with the reporter.

(Counsel and Reporter step to the bench.)

Verdict

The Court: Have you any exceptions?

Mr. Driscoll: This reference to Cardinelli and Ehrlich, what they testified to, as I recollect it, they helped in the re-working. As to whether it was a re-working or a re-work—

The Court: That is for the jury, isn't it?

Mr. Driscoll: Yes.

The Court: Anything you want to say, Mr. Packard?

Mr. Packard: No, your Honor.

The Court: Members of the jury, you may now retire with the exhibits in the case; and your verdict, by the way, is to be unanimous. Whether you find the defendants guilty or not guilty, the verdict is to be unanimous, and the verdict must cover each of the counts.

The jury may retire, and the alternates will not go back to the jury room with the twelve members of the panel. They are excused with the thanks of the Court.

(Jury retires at 11:15 a. m.)

[419] (Jury convenes at 12:30 p. m.)

The Clerk: Mr. Foreman, ladies and gentlemen of the jury, have you agreed upon a verdict?

The Foreman: We have.

The Clerk: How do you find—for the Government or the defendants?

The Foreman: We find for the Government.

The Clerk: As to Private Brands, Inc., on Count 1?

The Foreman: Guilty.

The Clerk: On Count 2?

The Foreman: Guilty.

The Clerk: On Count 3?

The Foreman: Guilty.

The Clerk: On Count 4?

The Foreman: Guilty.

The Clerk: On Count 5?

The Foreman: Guilty.

Verdict

The Clerk: On Count 6?
The Foreman: Guilty.
The Clerk: On Count 7?
The Foreman: Guilty.
The Clerk: On Count 8?
The Foreman: Guilty.
The Clerk: On Count 9?
[420] The Foreman: Guilty.
The Clerk: On Count 10?
The Foreman: Guilty.
The Clerk: On Count 11?
The Foreman: Guilty.
The Clerk: On Count 12?
The Foreman: Guilty.
The Clerk: On Count 13?
The Foreman: Guilty.
The Clerk: On Count 14?
The Foreman: Guilty.
The Clerk: On Count 15?
The Foreman: Guilty.
The Clerk: On Count 16?
The Foreman: Guilty.
The Clerk: On Count 17?
The Foreman: Guilty.
The Clerk: On Count 18?
The Foreman: Guilty.
The Clerk: On Count 19?
The Foreman: Guilty.
The Clerk: On Count 20?
The Foreman: Guilty.
The Clerk: On Count 21?
[421] The Foreman: Guilty.

Verdict

The Clerk: How do you find as to the defendant Francis P. Carey on Count 1?

The Foreman: Guilty.
The Clerk: On Count 2?
The Foreman: Guilty.
The Clerk: On Count 3?
The Foreman: Guilty.
The Clerk: On Count 4?
The Foreman: Guilty.
The Clerk: On Count 5?
The Foreman: Guilty.
The Clerk: On Count 6?
The Foreman: Guilty.
The Clerk: On Count 7?
The Foreman: Guilty.
The Clerk: On Count 8?
The Foreman: Guilty.
The Clerk: On Count 9?
The Foreman: Guilty.
The Clerk: On Count 10?
The Foreman: Guilty.
The Clerk: On Count 11?
The Foreman: Guilty.
[422] The Clerk: On Count 12?
The Foreman: Guilty.
The Clerk: On Count 13?
The Foreman: Guilty.
The Clerk: On Count 14?
The Foreman: Guilty.
The Clerk: On Count 15?
The Foreman: Guilty.
The Clerk: On Count 16?
The Foreman: Guilty.
The Clerk: On Count 17?
The Foreman: Guilty.

Verdict

The Clerk: On Count 18?
The Foreman: Guilty.
The Clerk: On Count 19?
The Foreman: Guilty.
The Clerk: On Count 20?
The Foreman: Guilty.
The Clerk: On Count 21?
The Foreman: Guilty.
The Clerk: And so say you all?
Jurors: Yes.
The Court: Members of the jury, I want to thank you heartily for the attention you gave the case and the [423] consideration you have evidenced by your verdict. This is the end of the term for you, and in discharging you from further duties I do so with the sincere thanks of the Court.

(Jury discharged.)

The Court: Now, Mr. Packard and Mr. Driscoll and the defendant.

(Mr. Packard and Mr. Driscoll and the defendant Francis P. Carey appear before the bar.)

The Court: I will impose sentence on the 18th.
Mr. Driscoll: Your Honor, you don't want a probation report?
The Court: Yes, I do. So, Mr. Driscoll and Mr. Carey, go up to the probation office and explain what the situation is and they will instruct you with regard to recommendations and certificatoins of various kinds.
Is Mr. Carey on bail?
Mr. Packard: No, your Honor. At the present moment he has been paroled into Mr. Driscoll's custody.
The Court. I see no reason for disturbing that.

Motion for New Trial—Denied

Mr. Packard: I see no reason, your Honor.

The Court: So that may continue, and be present on that day, too, Mr. Driscoll. Is that convenient for you?

[424] Mr. Driscoll: I am just trying—

The Court: That is a Friday.

Mr. Driscoll: Friday, the 18th.

The Court: If it is not convenient I will fix some other date.

Mr. Driscoll: If you will, your Honor. Would you be here on the 21st? I have something on on the 18th.

The Court: I could make it earlier that week or the 21st.

Mr. Driscoll: On Monday, if you will, your Honor. I have something on the 18th and the 16th, I recollect.

The Court: Then I will impose sentence on Monday, February 21st.

Mr. Packard: That is agreeable to me, your Honor.

Mr. Driscoll: Any motions I care to make I will make in the meantime.

The Court: Yes.

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[1] Brooklyn, New York,
March 9, 1955.

Before:

HONORABLE CLARENCE G. GALSTON, *U. S. D. J.*

Appearances:

(Same as before.)

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[2] The Clerk: Private Brands, Inc., and Francis P. Carey for sentence.

The Court: Mr. Palmer, I have read your brief in support of a new trial, and the motion is in all respects denied. So I shall impose sentence now.

As to the corporation, under each of the 21 counts a fine of one hundred dollars.

As to the defendant Francis P. Carey, under each of the counts I impose a fine of one hundred dollars, and suspend the imposition of jail sentence and place the defendant on probation for one year. Meanwhile the individual defendant is remanded to the custody of the marshal.

Mr. Packard: May I respectfully request, your Honor, that your Honor direct that he stand committed on the fines—

The Court: I stated that he shall be remanded to the custody of the marshal.

Mr. Palmer: May I inquire, if your Honor please, in view of the fact that your Honor has passed sentence, to which of course there is nothing further to be said, if your Honor would be good enough to give us until Monday morning to pay into the Clerk's office the fine imposed upon these folks; that is, to get the money [3] and pay it in? In the meantime—your Honor knows all about the pressure of 170 folks working there—

The Court: About what?

Mr. Palmer: About the 170 folks working in this factory.

The Court: Yes, and I can say for the benefit of Mr. Carey, as well as for your benefit, that the reason I have suspended the imposition of a jail sentence, is because of the fact that he has a plant that depends largely upon his own services for operation and if he were put in jail I dare say that that would interfere with the livelihood of some 170 employees.

I grant your application. He may have until Monday to pay the fine. Then he is remanded to the custody of the marshal.

Mr. Palmer: I beg your pardon, your Honor. In view of the fact that you granted my application would your Honor be good enough to remand him in my custody until

Monday, so that he can go ahead and arrange to get the finances necessary to pay this, because without him there is no one to get the money together.

The Court: Yes. In the meantime he is remanded in your custody.

[4] Mr. Palmer: And I will bring him back on Monday.

The Court: Right.

Mr. Palmer: Thank you very kindly.

Mr. Packard: And he stands committed on Monday if the fine isn't paid?

The Court: Yes.

Now, carry that through very carefully, Mr. Palmer, because I shall be sitting in the United States Court of Appeals on Monday, and I won't be here. I don't want to put the Government to the necessity of calling me back.

Mr. Palmer: Your Honor understands one thing—that in all the years I have had the privilege of appearing before your Honor I know that when you say a thing—and I say this without any attempt at flattery—when you say something I know that that is what has to be done and that is all there is to it.

The Court: Very good.

Mr. Palmer: Thank you.

I hereby certify that the foregoing is a true and accurate transcript from my stenographic notes in this proceeding.

SAMUEL S. STEIN,
Official Court Reporter,
U. S. District Court.

Notice of Appeal

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Cr. #43769

—o—

UNITED STATES OF AMERICA,

Appellee,

against

PRIVATE BRANDS, INC., and FRANCIS P. CAREY,

Defendants-Appellants.

—o—

Name and address of appellants:

Private Brands, Inc.
1 Pleasant Avenue
Clifton, New Jersey

Francis P. Carey
280 Gregory Avenue
Passaic, New Jersey

Name and address of appellants' attorney:

Archibald Palmer
320 Broadway
New York 7, New York

Offense:

Violation of Section 1001, Title 18 U. S. Code by indictment containing twenty-one counts

Notice of Appeal

Date of Judgment:

March 9, 1955

Brief description of judgment and sentence:

As to defendant-appellant Private Brands, Inc.

Under each of the 21 counts a fine of $100.00:

As to defendant-appellant Francis P. Carey:

Under each of the 21 counts a fine of $100.00 and a suspension of the imposition of a jail sentence, and placing said defendant-appellant on probation for one year

I, the attorney for the above named appellants, appeal to the United States Court of Appeals for the Second Circuit, on behalf of said appellants, from the judgments and sentences above mentioned, upon the grounds hereinafter set forth.

Dated, New York, March 14, 1955.

ARCHIBALD PALMER,
Attorney for Appellants.

Grounds of Appeal

1. The instant indictment should have been dismissed by the Trial Court as fatally defective in that it charged, in twenty-one counts, a continuing crime which should have been charged in one count.

2. The Court erred in assigning Jeremiah J. Driscoll as attorney for the individual defendant-appellant after said attorney had expressed a desire to withdraw as attorney for said defendant-appellant and said defendant-appellant had made a request to defend himself personally.

3. The Court erred in denying the appellants' motion to dismiss the indictment at the close of the Government's case upon the ground that the Government failed to adduce proof sufficient to establish the commission of any crime by the appellants.

4. The Court erred in denying appellants' motion to dismiss the indictment at the close of the Government's case, upon the ground that the Government failed to adduce proof sufficient to establish the commission of any crime by appellants beyond a reasonable doubt.

5. The Court erred in denying appellants' motion for a directed verdict of not guilty upon the ground that there was no evidence in the case upon which the jury could find that appellants had committed a crime.

6. The Court erred in denying appellants' motion, made after the verdict, to set aside the verdict of guilty against the appellants, for a new trial, and for an arrest of judgment upon the ground that the verdict was contrary to the evidence, contrary to law, and against the weight of evidence.

7. The verdict of guilty against the appellants is contrary to law.

8. The Trial Court erred in denying numerous motions to withdraw a juror and for a mistrial.

9. The Trial Court erred in various rulings on the receipt and conclusion of evidence.

10. The Trial Court made various errors in instructing the jury, particularly in failing to charge the jury in connection with the elements of the crime, the presumption of innocence, the failure of the individual defendant-appellant to take the witness stand, and many other matters affecting substantial rights of the appellants.

11. The Trial Court erred in imposing a fine on both appellants on each count of the indictment, which imposition constitutes multiple punishment.

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ADDENDUM TO APPENDIX

Decision

ARMED SERVICES BOARD OF CONTRACT APPEALS
Washington, D. C.

ASBCA No. 2048

Appeal of—

Private Brands, Incorporated

Under Contract No. MPA 30-287-md-18018

Appearances for the Government:

LT. COL. MAURICE LEVIN, JAGC
Chief Trial Attorney

CAPTAIN JAMES R. HARRINGTON, JAGC
Trial Attorney

Appearance for the Appellant:

ARCHIBALD PALMER, Esq.

This contract is for 9,936 bottles of chloroform for a total contract price of $3,924.72 or 39½ cents each. The supplies were delivered in December 1952; and thereafter in April 1953 complaints came in that the chloroform was defective and unsuitable for issue and use. The contracting officer rendered a decision finding the material defective and not in accord with specifications. He demanded that appellant reimburse the Government for the material remaining on hand. The amount claimed from appellant is $1,946.96. Appellant appealed and claims that the chloroform was not defective *at the time of delivery;* that it did conform to specifications; and that, if it spoiled, it was due to the delay in its use and the action of the container caps even though those caps complied with specifications.

Decision

The Government predicates its right to recover upon the Guaranty clause of the contract which reads:

> "27. GUARANTY
>
> "The Contractor guarantees that *at the time of delivery* thereof the supplies provided for under this contract will be free from any defects in material or workmanship and will conform to the requirements of this contract. Except as to latent defects, notice of any such defect or nonconformance shall be given by the Government to the Contractor within one year of the delivery of the defective or nonconforming supplies. If required by the Government within a reasonable time after such notice, the Contractor shall, with all possible speed, correct or replace the defective or nonconforming supplies. When such correction or replacement requires transportation of any supplies, shipping costs, not exceeding usual charges, from the delivery point to the Contractor's plant and return, shall be borne by the Contractor; and the Government shall bear all other shipping costs. The guaranty shall then continue as to corrected or replacing supplies until one year after the date of redelivery. If the Government does not require correction or replacement of defective or nonconforming supplies, the Contractor, if required by the Contracting Officer within a reasonable time after the notice of defect or nonconformance, shall repay such portion of the contract price of the supplies as is equitable in the circumstances." (Italics added for emphasis.)

It appears that the chloroform, when delivered, was tested by experienced chemists for the Government and approved. Obviously, then, such defects as were found developed after delivery, unless it can be shown that the

inspections at delivery were in error. Appellant has a right to point to these Government tests and their conclusions as support for its contention that "*at the time of delivery*" the chloroform was not defective. Quite naturally the conclusions from those inspections place the burden of establishing that they were erroneous upon the shoulders of the Government. This burden, we believe, the Government has failed to uphold.

An Inspection Provision (No. 33) provides, among other things, that acceptance by the Government shall not be *conclusive* on the question of whether there has been any violation by the contractor of its obligations under Provision 27 (quoted above). This Inspection Provision read in the light of No. 27 simply deals with a matter of proof of conditions "*at the time of delivery*": (See italicized phrase in quotation) and says, in so many words, that though one would ordinarily conclude from an acceptance that the chloroform did conform to requirements, it may be shown that as a matter of fact it did not. Carrying the matter a step farther, it is not hard to see that if that acceptance is founded upon chemical tests made by one or more experts—chemists—on behalf of the Government, the conclusion of conformity is considerably strengthened; and the burden of overthrowing that conclusion is much harder. The proof in the present case, offered to overcome the conclusion, is productive merely of possibilities. Its probative effect is to leave the mind in doubt as to whether the condition, of which complaint is made, developed from a defective condition *existent at the time of delivery* or developed subsequent to delivery. Even considering the matter in the light of the latent defects provision of the contract (No. 5), one is unable to say, from the evidence produced, that the defect was one existent at the time of delivery but was not discovered due to its hidden character.

To put the uncertainty in the words of one of the Government witnesses, we quote a few lines of his testimony.

Decision

The presiding member asked this question:

> "How do I know on the basis of your tests what the condition of the stuff was on the day it was delivered?
>
> "The Witness: Sir, I would like to make a comment here, that the deviations noted in the first complaint report was different from the deviations noted in the second complaints report. If [sic] the first one it was specific gravity, readily carbonizable substances, residue on evaporation, and on the second report of the complaint from Schenectady the deviation was odorous and dechlorinated composition products.
>
> "If this material was one of the same lot as appears on the label by the lot number, I could—I cannot explain why that should be."

The testimony generally is quite clear to the effect that the chloroform is very sensitive to atmospheric and light conditions, as well as substances with which it comes in contact. There seems to be no question about there being defects in the chloroform, discovered in April or thereafter; but the weak link in the chain of proof comes with the attempt to attribute these defects to the condition *at the time of delivery*. The acceptance of the chloroform after tests, at the time of delivery, is a fact upon which appellant may rely as evidence of its then condition; and it then behooves the Government to show that those tests were in error, or that the defects were latent. Proof of the result of the later tests is not sufficient, as the expert testimony is to the effect that the defective condition could have developed afer delivery. In other words, a defective condition in April or later is not inconsistent with an acceptable condition at time of delivery.

We see no escape from the conclusion that the appeal should be sustained. It is so ordered.

Dated: 19 April 1956.

/s/ Eugene E. Pratt
EUGENE E. PRATT
Member of Division No. 3
Army Contract Appeals Panel

I concur in result

/s/ Joseph A. Avery
JOSEPH A. AVERY
Chairman of the Army Contract
Appeals Panel and Member of
Division No. 3

I concur

/s/ Willard Winter
WILLARD WINTER
Member of Division No. 3
Army Contract Appeals Panel

I certify that the foregoing is a true copy of the findings of fact, decision and views of the Army Contract Appeals Panel of the Armed Services Board of Contract Appeals in ASBCA No. 2048, appeal of Private Brands, Incorporated, under Contract No. MPA 30-287-md-18018. I further certify that there has been filed with the Recorder a statement by the Chairmen of the respective Panels of the Board signifying that in their opinion a review of the decision by the full Board is not required.

Dated: April 19, 1956.

William M Lyons
WILLIAM M. LYONS, Recorder
Armed Services Board of
Contract Appeals

[SEAL]

24053

No. 727

To be argued by
C. W. WICKERSHAM, JR.

Office - Supreme Court, U.S.
FILED
JAN 16 1958
JOHN T. FEY, Clerk

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 24053

UNITED STATES OF AMERICA,

Appellee,

—against—

PRIVATE BRANDS, INC., and FRANCIS P. CAREY,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE AND APPENDIX

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UNITED STATES COURT OF A
FILED
OCT 17 1957
DANIEL FUSARO CLERK
SECOND CIRCUIT

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 24053

UNITED STATES OF AMERICA,

Appellee,

—against—

PRIVATE BRANDS, INC., and FRANCIS P. CAREY,

Defendants-Appellants.

BRIEF FOR THE APPELLEE

Statement

The defendants, Private Brands, Inc., and Francis P. Carey, appeal from judgments of conviction entered March 9, 1955 in the Eastern District of New York (Galston, D. J.) following a jury verdict of guilty on all counts of a twenty-one count indictment. The defendants were found guilty, in essence of fraudulently representing to the government that certain chloroform purchased by the government conformed to the standards of the United States Pharmacopoeia (hereinafter referred to as "USP") when in fact it did not.

The Indictment

Counts One through Five and Counts Eleven through Twenty-One of the indictment charge the defendants, Private Brands, Inc., and Francis P. Carey, with know-

ingly and wilfully submitting bills of the defendant Private Brands, Inc., to the Armed Services Medical Procurement Agency for payment, knowing them to contain false and fraudulent entries namely that they were for chloroform that conformed to USP specifications whereas in fact the chloroform delivered to the government did not conform to such specifications. Counts Six through Ten charge the defendants, Private Brands, Inc., and Francis P. Carey with knowingly and wilfully concealing by a device a material fact, that is, that a portion of certain chloroform shipped to the Armed Services Medical Procurement Agency consisted of chloroform which had previously been rejected by the agency for non-conformance to the USP specifications, and that they concealed this material fact by submission of bills of the defendant, Private Brands, Inc., which bills identified the shipments under a different lot number than that which had been rejected by the government (6a-21a).*

The Statute

All twenty-one counts of the indictment are predicated upon Title 18, United States Code, Section 1001.

Questions Presented

The questions to be determined on this appeal are:

I. Whether or not the Government established a prima facie case;

II. Whether or not Francis P. Carey, on the day of trial, had an absolute right to discharge his attorney and proceed pro se, although retaining the same counsel to

* References unless otherwise noted are to the pages of Appellants' Appendix.

represent Private Brands, Inc., of which he was president and sole stockholder, and whose interests were identical with his; and if this court holds he had such a right, did a denial of it constitute such prejudicial error as to require reversal;

III. Whether or not the rulings of the Court during the course of the trial concerning the admissibility of certain evidence constitute reversible error;

IV. Whether or not the indictment was multiplicitous in charging a separate crime for each false document submitted;

V. Whether or not the charge of the Trial Court contained such error as to require reversal when no objections or exceptions to the charge were noted by defense counsel; and

VI. Whether the Assistant United States Attorney committed prejudicial and reversible error in his summation.

The Facts

The appellant, Francis P. Carey, was the president of Private Brands, Inc. at the time of the events which occurred herein, and throughout the time of the trial. In 1952, he owned half of the common stock, but by the time the matter was brought to trial, he had acquired substantially all of the stock (110a-111a). Private Brands, Inc., during the period of time in question was in the contract packaging business, that is, they did not manufacture products, but packaged them for other concerns (232a). Carey also had an interest in another company,

known as the Contract Packaging Company, which was apparently engaged in a similar business (222a).

In the early part of 1952, the appellant, Private Brands, Inc., by its president, appellant Carey, entered into a contract with the Government for the sale to the Government of 25,824 one pound bottles of chloroform, which chloroform was to conform to USP specifications. This contract had a clause providing that the Government, at its option, could order a further equal amount at the same price (Ex. 1, Clause 37). The Government exercised its option and ordered an additional 23,619 bottles of chloroform under this contract (65a).

Private Brands did not manufacture chloroform, and on the date of the contract, according to its own books, had no chloroform of any type in stock (115a). On February 6, 1952, Private Brands purchased 27,950 pounds of technical chloroform* from E. I. duPont Company, to fulfill its contract with the Government, and thereafter bought an additional 27,950 pounds of technical chloroform from E. I. duPont Company, apparently to meet the Government's additional order.

DuPont's technical chloroform did not meet USP specifications, and at the time of the purchases by Private Brands, Inc., E. I. duPont Company did not manufacture USP chloroform. On March 19, 1952, Private Brands bought 3,000 pounds of USP chloroform from McKesson & Robbins, which was the only USP chloroform received by Private Brands from the time of the contract until after all chloroform had been delivered to the Government (119a).

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* The difference between "Technical Chloroform" and USP Chloroform is explained in Point I, below.

Private Brands received the chloroform in drums and bottled and labeled it in one pound bottles for shipment to the Government. The first 25,824 bottles were designated lot #2049, and samples of it taken by a government inspector for testing on February 18, 1952, prior to shipment, were rejected by the Government laboratory (133a-134a, Ex. 11).

Thereafter, new samples taken from a shipment designated as lot #2081 were accepted by the government after testing as conforming to USP specifications. The entire amount called for under the contract was then delivered, including both the 25,824 pounds originally required, and the additional 23,619 pounds which had been ordered by the Government under its option (177a-178a).

Delivery was made in sixteen shipments, and an invoice covering each shipment was submitted to the government. Each invoice was for a number of bottles "Chloroform, 1 lb. U.S.P." and on each invoice, Private Brands, Inc., by appellant Carey, certified that the bill was "just and correct" (177a-178a, Ex. 54).

After delivery, it was discovered that the chloroform shipped did not conform to USP standards (141a-142a) and an investigation was commenced (202a).

With respect to the 25,824 pounds of chloroform originally rejected by the government, the appellant Carey, told agents of the Federal Bureau of Investigation that he and several other named individuals had reworked and redistilled it before placing a new lot number on it (203a, Ex. 57).

The Government proved to the satisfaction of the jury, however, that this had not been done, but that a new label

had merely been pasted over the old label on the bottles of the non-conforming chloroform; and that appellants had given it a new lot number and had delivered to the Government the same chloroform, in the same condition, which the Government had originally rejected. The Government's evidence on this issue was conclusive, coming not only from the appellants' own employees who Carey had claimed had done the work (219a, 233a), but also from the work records of Private Brands, Inc. (114a) and from scientific chemical analysis of the chloroform (147a). The Government further proved that the appellant, Francis P. Carey had attempted to suborn perjury to prove his false defense (220a).

With respect to the 23,554 pounds ordered by the Government under the optional increase clause in the contract, and which did not conform to USP specifications, the Government proved that the only chloroform bought by the appellants in sufficient quantity to fill this additional requirement under the contract was the duPont technical chloroform which did not conform to USP specifications (83a), and further proved that this had not been redistilled (220a). The underlying theory of the Government's case, therefore, was that the appellant had given samples to the Government for testing which were not representative of the chloroform actually delivered.

Though several witnesses were called by the appellants, the appellant Carey did not take the stand.

POINT ONE

As there was substantial evidence of defendant's guilt, the verdict should not be set aside.

A. The Evidence Is to Be Viewed in the Light Most Favorable to the Government.

In *United States* v. *Manton*, 107 F. 2d 834, 839 (2d Cir. 1939), cert. den. 309 U. S. 664, this court stated that

> "In passing upon the sufficiency of the proof, it is not our province to weigh the evidence or to determine the credibility of witnesses. We must take that view of the evidence most favorable to the government and sustain the verdict of the jury if there be substantial evidence to support it."

See also, *United States* v. *Brown*, 236 F. 2d 403, 405 (2d Cir. 1956).

Again, in *United States* v. *Goldstein*, 135 F. 2d 359, 361 (2d Cir. 1943), the court, in affirming a conviction for conspiracy, said

> "In deciding on appeal whether the evidence supported the verdict all of it is to be considered in the light most favorable to the government and conflicts which can fairly be resolved in the latter's favor should be."

B. There Was Substantial Evidence of Defendant's Guilt.

The evidence upon which the Government relied was clearly substantial, and without any doubt supported the verdict of the jury.

Near the end of 1951, the Armed Services Medical Procurement Agency in Brooklyn sent out invitations to bid for a contract to sell 25,824 one pound bottles of USP chloroform to the Government (47a). The appellant, Private Brands, Inc. was the successful bidder of six who responded, and obtained the contract with a bid of $.35½ per pound for chloroform packed for the domestic market and $.36 per pound for chloroform packed for export (47a). The other bids ranged from $.369 to $.60 per pound (70a, 71a, 96a, Ex. 2). A notification of the award dated December 26, 1951 was sent to Private Brands, Inc., and on February 9, 1952, the formal contract (Exs. 5 and 19) was mailed to Private Brands (51a).

The contract contained a clause which permitted the Government, at its option, to require the seller to furnish additional chloroform up to an amount equal to that contracted for, at the same price (63a, 64a, Ex. 1, Clause 37). The Government, on February 20, exercised that option, and ordered 11,616 one pound bottles, and on March 4, 1952, ordered 12,048 bottles more (65a).

Private Brands, Inc. was in the contract packaging business (232a); it did not manufacture chloroform and had none on hand when its bid was accepted (115a). Rather, it bought the chloroform, which it delivered to the Government, in bulk from the E. I. duPont Company (118a), and bottled, labeled and packaged it for shipment under the contract here in question (237a-238a). This is proved by Exhibit 29, the Private Brands stock record (115a) which shows that from 1949 until February 6, 1952 Private Brands had no chloroform on hand. On that date it received 27,950 lbs. of duPont chloroform. It received 3,000 lbs. of chloroform from McKesson & Robbins on March 19, 1952, an additional 27,950 lbs. from duPont on

May 5, 1952 and no further chloroform until July 15, 1952 which was after the chloroform in question had been delivered to the government (Ex. 54).

Chloroform is a generic name for a chemical having $CHCl_3$ as its basic ingredient (237a), which is mixed with small amounts of other chemicals known as stabilizers, which protect the product against adverse effects of light, heat, air and conditions which might tend to decompose it (82a). USP chloroform must contain "not less than 99% and not more than 99.5% of $CHCl_3$, the remainder consisting of alcohol" (160a). Chloroform which does not conform to USP specifications is called "technical chloroform" and differs according to the specifications of each particular manufacturer (174a). The difference between USP chloroform and technical grade chloroform was explained by the Government expert, Max Feinberg, as follows:

> "A. The USP indicates the maximum degree of impurities permitted in these tests. It cannot exceed certain maximum impurities. If it does, it fails.
>
> The technical grade chloroform, the specifications vary from one company to another, to the point where I could not possibly tell you what impurities may be present in any one technical grade chloroform. To my knowledge, there is no set specification or no prepared specification which universally takes in technical grade chloroform" (174a).

The E. I. duPont Company at the time did not make grade chloroform to USP specifications (81a-82a) but made only technical grade chloroform which did not use any alcohol as a stabilizer, but used amylene in the ratio of between 2/100 of 1% and 3/100 of 1% by weight, and therefore had not only a different chemical content but

also a different specific gravity from USP chloroform (83a).

Not only did the chemical formula vary between technical and USP chloroform, but the price of USP grade was substantially higher (84a). USP chloroform required more refining than did the technical grade, and thus was more difficult to manufacture (84a). Thus, Private Brands, Inc. purchased the technical grade of chloroform from duPont at 16.2¢ per pound (118a), whereas the chloroform purchased from McKesson & Robbins, which was the only USP chloroform purchased by appellants, cost 30¢ per pound (119a).

The significant difference between technical grade chloroform and USP chloroform was that the technical grade would not be used medicinally, nor for any test in the United States Pharmacopoeia requiring chloroform, because of the inaccurate results it would produce if substituted for USP chloroform (154a).

Private Brands, Inc. bottled and prepared the first 25,824 pounds of chloroform for shipment to the Government and marked it lot #2049 (105a). The label for this lot also contained a stock number which was erroneous. On February 18, 1952, a Government inspector took five samples of lot 2049 (105a), and laboratory analysis of the chloroform showed that it did not conform to USP standards (59a). On March 5, 1952, the Government wrote Private Brands, summarizing the deficiencies in the chloroform, rejecting the material represented by the samples, and asking if new samples would be available before March 24, 1952. Besides non-conformance with USP standards, the chloroform was also rejected because it was mislabelled as to the stock number (61a).

Mr. Carey thereupon telephoned the duPont Company and asked for the results of tests that had been made on the chloroform purchased by Private Brands. The duPont Company notified Carey of the results of such tests (127a, Ex. 18). These tests showed that the chloroform did not conform to USP specifications (Compare Exs. 18 and 38 with 82a-84a). The letter written by duPont to Private Brands, Inc., to this effect (Ex. 18), together with the duPont invoices to Private Brands, Inc., which specifically state the Pure Food & Drug Administration requirement that the chloroform be labeled technical (Ex. 31) clearly establish Carey's knowledge that the duPont chloroform did not meet USP specifications.

On March 7, 1952, Private Brands, Inc. informed the Government that new samples would be available (62a). Thereafter, a Government inspector selected new samples marked Lot #2081 and turned them over to one of appellants' employees for mailing to the Government laboratory (106a). Upon receipt at the Government laboratory the samples were tested and accepted and the rest of the chloroform was delivered to the Government (177a-178a).

As the chloroform was used, complaints were received by the Armed Services Medical Procurement Agency that the chloroform had foreign particles in it (140a). Samples were sent in to the laboratory by the various medical depots and upon testing were found not to comply with the USP standards (142a). Further examination disclosed that all the bottles remaining in the medical depots which had been delivered as part of the first 25,824 bottles had a label designating the shipment as lot #2081 pasted over a label marked lot #2049 (180a-181a). The new label so covered the old that the exist-

ence of two labels was not readily apparent, as Exs. 21, 51 and 55 demonstrate.

The Federal Bureau of Investigation was then called in and agents interviewed the appellant, Francis P. Carey, who told them that all the cartons in which the original rejected lot of chloroform had been packed were opened and the bottles removed and placed on a drainboard over the top of a tank. He claimed that the tank was filled with activated charcoal, and that the chloroform was filtered and placed back in the same bottles with a rotary filler; and that the bottles were then capped, relabeled, and replaced in the cardboard carton from which they had been removed, and the carton was relabeled (208a-209a, Ex. 57). Carey claimed that he himself had reworked the chloroform on a weekend with the assistance of Robert Ehrlich, the production manager of Private Brands, Inc., and Anthony Carpanelli, who was in the employ of Ehrlich and Carey in a concern known as Contract Packaging Company.

Both Ehrlich and Carpanelli denied on the stand that they had participated in reworking the chloroform (219a, 223a). Ehrlich, however, testified that the appellant, Francis P. Carey, had asked him to tell the F. B. I. Agents that he and Carpanelli had assisted in reworking the chloroform, although in fact they had not done so (220a, 224a). He further testified that Carey had told him at the time of the relabeling that the chloroform had been rejected because of mislabeling, and made no mention of the chemical defects (244a). He added that after the notice of rejection, the bottles had been relabeled with the correct stock number as lot #2081, the second label being placed over the first, *and that nothing had been done to the contents of the bottles* (221a).

Carpanelli said that in 1952, he was employed by Contract Packaging Company, which was owned by Ehrlich and Carey (222a). However, he denied that he had at any time participated in any reworking, processing, or filtering of chloroform at Private Brands, Inc., or any place else (223a, 226a). He added that during one of Carey's visits to Contract Packaging Company, Ehrlich had told him to tell the F. B. I. that the chloroform had been reworked, and he had done so (224a).

In summary, then, the Government proved that the five shipments of lot #2081 were duPont technical alcohol; that it did not originally conform to USP specifications, and had not been reworked in any way. This was the cholorform for which Carey certified that five invoices describing it as USP chloroform were "just and correct" (177a), although he knew in fact that it did not meet USP specifications. These invoices were the basis of Counts One to Ten of the indictment, each constituting both a false statement and a device for concealing the fact that the chloroform had been previously rejected under lot #2049 as not up to specifications.

The chloroform purchased for the optional increase of 23,664 bottles was likewise duPont technical chloroform which was not received until May 5, 1952, two months after the Government had notified appellants that the chloroform tendered under lot #2049 (also technical chloroform) was unacceptable (116a). There was no contention that any of this was ever reworked to conform to USP specifications. The Government proved that it did not conform through both the duPont chemist (82a-83a) and the Government chemist who examined it after delivery (143a-144a). The eleven bills covering the eleven shipments of this chloroform form the basis of Counts

Eleven through Twenty-one of the indictment and each describes the chloroform shipped as USP chloroform, and is certified by appellants as being "just and correct" (177a-178a). There was, therefore, substantial evidence to justify the conviction of both appellants.

C. The Government Introduced Sufficient Evidence from Which the Jury Could Find That the Samples Approved Were Not Representative of the Chloroform Delivered.

Appellants' defense was that because the samples taken by the Government Inspector were approved, the chloroform, when delivered, must be assumed to have conformed to USP specifications. The Government, however, introduced evidence sufficient for the jury to find that the samples approved were not representative of the chloroform delivered. As has been explained above, the Government showed (a) that duPont technical chloroform had been purchased for the contract (118a) and (b) that such chloroform had not been reworked or changed from the condition in which it had been when rejected (221a). Tests by the Government chemist after receipt of the chloroform further confirmed that it was not USP chloroform (143a-144a). The inference is clear therefore that the samples submitted must either have been not representative of the lot delivered or had been incorrectly analyzed by the Government.

The Government proved that there was an opportunity for appellants to tamper with the samples taken. The inspector selected them at random but appellants omit to state, as the Government Inspector testified, that having selected them, *he turned the sample bottles over "to the contractor [Private Brands, Inc.] for mailing to the lab-*

oratory" (106a). In other words, the inspector did not take the samples with him to the laboratory, but left them in the possession of Private Brands, Inc., where it was possible for USP grade chloroform to be substituted from the 3,000 pounds purchased from McKesson & Robbins, for the samples which had actually been selected.

Further proof that the samples approved were not representative of the lot delivered was the fact that five bottles of chloroform were delivered to the Government as being representative of the first group of 25,824 bottles (lot #2081), only four of which were consumed in the testing at that time. The fifth bottle remained on the shelf until 1953, after complaints about the shipments had been received. At that time it was analyzed with other bottles delivered by Private Brands, Inc., but *though the sample bottle still met* USP standards, the other bottles did not (147a).

Additional evidence that the samples sent were not representative was the proof that although all the bottles of lot #2081 shipped to the Government depots had the new lot #2081 label pasted over the lot #2049 label, the sample bottle had only the label marked lot #2081 (Ex. 22). There was, consequently, adequate evidence for the jury to find that the samples were not representative of the shipments.

The defendants rely upon a decision of the Armed Services Board of Contract Appeals on an entirely different contract for chloroform delivered to the Government in December of 1952 (343a). There is no record here of what evidence was submitted in connection with that case, whereas the evidence submitted in the District Court clearly shows that at the time of delivery the chloroform

here in question did not conform to the specifications for USP chloroform.

D. There Being Substantial Evidence to Support the Verdict, the Judgment Should Not Be Set Aside.

In *United States* v. *Sicurella*, 187 F. 2d 533 (2nd Cir., 1951), this Court held that the verdict of a jury in a criminal case will not be disturbed unless it is without substantial evidence to support it.

Thus, even if this Court finds there is evidence to the contrary, the judgment should not be disturbed as there is substantial evidence to support it.

POINT TWO

The Trial Court properly sustained Government objections to evidence offered by appellants.

At the trial, appellants apparently wanted to prove that USP Chloroform could accumulate "sediment and flaky things" (300a) if allowed to stand for some time and if the contents of the bottle came in contact with the adhesive joining the cap to the seal (316a). Notwithstanding the fact that this was merely one of several defects noted in the chloroform delivered (134a) and therefore was in no way a complete defense, the court stood ready to receive such evidence provided that appellants showed that the chloroform which went through such a change was of a type similar to that delivered to the Government (e. g. 312a, 315a). It was for failure to prove this essential point that appellants' offer (which at most was a partial and not a complete answer) proved abortive.

The chloroform delivered to the Government consisted of 49,443 one pound bottles which were sealed with caps purchased from Ferdinand Gutman & Company (267a). The only available chloroform which could have been used to fill the orders was the 55,900 pounds of technical chloroform purchased from E. I. duPont Company (115a, 118a, 120a) and the 3,000 pounds of USP Chloroform bought from McKesson & Robbins (119a).

In their attempt to prove that the method of sealing the bottles caused deterioration of the contents, appellants asked questions which were improper because of an inadequate foundation, and even after the reason for the impropriety was pointed out and they were given an opportunity to lay the appropriate foundation, they failed to do so (e. g., 288a, 303a, 312a).

Thus, appellants' witness, Horvath, the Traffic Manager of Private Brands (289a), testified that in January of 1955 (i. e., on the eve of trial), he purchased one five-pound bottle and three one pound bottles allegedly of USP chloroform from the Fisher Scientific Company (287a). Horvath was not a chemist and did not know for a fact what was in the bottles (310a), but only that he got an invoice for USP chloroform (286a); nor did he know whether this bottle was sealed with a Gutman seal (286a).*

Horvath sent one bottle back to the Fisher Scientific Company, one to Bendiner and Schlesinger for testing, and kept the balance (300a). When the third sample which was marked "Merck USP" Chloroform was offered

* The assertions at page 27 of appellants' brief that the bottle was sealed with a Gutman seal appears to be based on material outside the record.

by appellants, the court properly sustained the Government's objection, holding that appellants had not competently proved the contents of the bottle. The court's ruling at 303a was as follows:

> "The Court: Yes. If you produce other evidence to connect with the sample received the statement that the invoice of Exhibit E accurately describes what is in that bottle and call representatives from the Fisher people to prove that, then I will consider the offer of this Exhibit F for identification in evidence."

Appellants thereafter appear to have abandoned their attempt with respect to this particular chloroform and recalled Horvath who testified that on April 10 or 11, 1952 he took a sample of the chloroform which had been processed and sealed with a sealable enclosure, and which was a part of that used to fill the government contract at that time, and sent it to Bendiner & Schlesinger for testing (308a, 309a). He admitted that he did not know what was in the bottles that he had sent (310a). Appellants then offered their expert witness for the analysis of this chloroform (Defendants' Exhibit L). The Government objected that there had been no proper foundation laid to connect it with anything in the case and that there was no evidence that the chloroform tested ever met USP standards. The court, however, received the evidence subject to connection:

> "The Court: But the connecting legal point has to be established that that sample which Mr. Bechtoldt analyzed and which is covered in this report is or was prepared in the same way and of the same substances as called for under the contract with the Government" (312a).

The defendants thereupon recalled Mr. Horvath for the third time. He could not remember the lot number of the bottle from which the chloroform was selected, to tie in the identification, and was completely unable to prove that the bottle was one of a shipment similar to that sent to the Government (315a). The defendants' expert, Mr. Bechtoldt, was then recalled and asked a hypothetical question to which an objection was sustained because of the incorrect characterization of the evidence (317a, 318a). He was then asked whether duPont technical chloroform would pass the USP test and over objection he was allowed to answer. He stated that chloroform with a specific gravity of 1.479 i.e., that of some of the chloroform delivered to the Government (Ex. 18) would not meet USP standards (319a-320a).

The appellants' brief, therefore, is completely in error in the statement of the facts. Horvath did not know whether the chloroform purchased from Fisher Scientific Company in 1955 was sealed with a Gutman seal or not (286a), and proof as to that bottle was immaterial. With respect to the bottle selected in 1952 and sent to Bendiner and Schlesinger, examination of the record shows that the defendants failed to prove that this bottle ever came from the shipment prepared for the Government, since the defendants' sole testimony to this effect was stricken as given in response to a leading question (314a). The significance of the evidence excluded, furthermore, has not been shown in appellants' brief.

POINT THREE

The Trial Court properly refused to allow the attorney for appellant Carey to withdraw on the day the case was called for trial.

The indictment in this matter was filed in the District Court on December 2, 1954, and on December 8, 1954 both appellants appeared represented by Jeremiah Driscoll, Esq. and pleaded not guilty before Chief Judge Inch. At that time, the Assistant United States Attorney notified appellants and their counsel in open Court that the Government would be ready and expected to go to trial some six weeks later; that is, on January 24, 1955 (ga3).* A week later, on December 15, 1954, appellants moved for an order permitting them to inspect the Grand Jury Minutes. This motion was heard by Judge Inch who denied it from the Bench on December 27, 1954 (1a), although a formal order denying the motion was not entered until January 7, 1955 (2a).

On January 14, 1955, the Government sent out notices that the case would be called for trial on January 24 (ga3). On that date the case was called and adjourned until January 27, 1955, at which time appellants, still represented by the same attorney, namely, Mr. Driscoll asked for a further adjournment and the Court, over the Government's objections set the case down for January 31st (ga4).

At no time during the discussions on January 27 was there any suggestion that appellants were in any way dissatisfied with their counsel or desired to proceed with-

* "ga" refers to Government's appendix.

out counsel (277a, ga1-5). Not until the case was forced on to trial did appellant Carey indicate any dissatisfaction with the attorney whom he had personally selected to represent him and his corporation and who had represented them for some seven weeks between the date of indictment and the date when they knew the case would be called for trial. Indeed at the time the case was called on January 27, 1955, appellants' attorney told the Court that over the weekend, he would examine certain records he wanted which were in the possession of the Government (ga4).

On January 31, 1955, the date the case was called for trial, appellant Carey sought to discharge Mr. Driscoll and act as his own attorney, but to retain Mr. Driscoll as attorney for the corporation of which appellant Carey was the president and substantially the sole stockholder (111a) and the interests of which were admittedly identical with his (42a). In other words he wished, in effect, to be both represented by an attorney and to act as his own counsel.

Carey was not an attorney, and the only excuse offered for his wishing to represent himself was that Mr. Driscoll did not have the technical knowledge to cross-examine the Government's expert witnesses on the technical aspects of the case (42a). The trial court, however, was apparently of the opinion that if appellant's motion was granted, it would cause further confusion and delay in the trial.

In addition, the trial court, having heard Mr. Carey speak, was aware of his speech difficulty which would have made the conduct of a trial well-nigh impossible. Since Mr. Carey had expressed no dissatisfaction with his counsel, and indeed wished to retain him to represent the

corporation with which his interests were identical, there was clearly no abuse of discretion on the part of the Trial Court.

While refusing to allow Carey to act as his own attorney, the Court, of course, permitted him to sit at counsel table and freely to assist Mr. Driscoll in working out the questions to be put to witnesses (43a) even where such conferences appeared to have resulted in prolonged delays (e. g. 242a). Mr. Driscoll, moreover, contrary to what appellant alleges, appeared to have a good grasp of the technical aspects of the case (e. g. 86a), and was admittedly competent to defend the corporation.

In *United States* v. *Mitchell,* 138 F. 2d 831 (2d Cir., 1943), cert. den. 321 U. S. 794, the defendant attempted to discharge his attorney after the jury had been sworn, but before the actual taking of testimony had commenced. There the Court said, at page 831:

> ". . . when a jury case is already on trial in a district with a crowded calendar such as obtains in the Southern District of New York, a continuance for the obtaining and indoctrination of new counsel would be disruptive of the court's business and could not be claimed under the circumstances except for rather exceptional cause."

In the instant case, although the jury had not yet been sworn, the matter was about to proceed for trial, and it was clearly within the discretion of the Trial Court to refuse to allow a defendant with a speech impediment to discharge an attorney and at the same time retain him to represent what was in effect his alter ego, i. e., the corporation.

In fact, in an earlier hearing in the *Mitchell* case, 137 F. 2d 1006, 1010 (2d Cir., 1943), the Court pointed out that:

> "The cases cited by defendant stress equally, as, indeed, they properly should, the right of an accused to act for himself and his right to have a lawyer assigned in his behalf. . . . Obviously, however, those rights cannot be both exercised at the same time."

In *United States* v. *Foster*, 9 F. R. D. 367, 372 (S. D. N. Y. 1949), the court (Medina, J.) refused to permit a defendant to discharge his counsel and sum up on his own behalf:

> "Thus, at the outset, it seems significant that neither the Constitution nor the applicable federal statute lend the slightest support to the claim that Mr. Davis may dismiss his counsel, and sum up in his own behalf, as a matter of right. The clear purport of the language just quoted seems to the contrary. One of the fundamental rights of defendants in criminal cases is the right to counsel. But the alleged absolute right, irrespective of the attendant circumstances, to dismiss counsel and carry on *pro se* is a quite different proposition. If such were the law, there would be a fertile field in which defendants in criminal cases could operate to frustrate justice and, under the aegis of an alleged constitutional or other right, resort to every bedevilment of the court and jury that the ingenuity of man could devise.
>
> "Thus, even in jurisdictions where a defendant may be heard 'in person, by attorney, or both' • • • courts have discretion to decide how defendant and counsel will conduct the case • • • and may regulate the

> defendant's right to be heard, to maintain order, prevent unnecessary consumption of time or other undue delay, to maintain the dignity and decorum of the court and to accomplish a variety of other ends essential to the due administration of justice, which are so various as to make it both unnecessary and unwise to attempt to specify and enumerate them all. • • •
>
> "In the federal courts, where a defendant has no right to be heard both in person *and* by attorney, it would seem clear that the control of the proceedings by the court is no less extensive. • • • And it has been twice held in this Circuit that a defendant in a criminal case has no absolute right to dismiss his lawyer."

It is clear, therefore, that not only did the court act within its discretion in refusing to permit Carey to discharge Mr. Driscoll, but also in not allowing Carey to undertake the cross-examination of government witnesses (277a). In *Overholser* v. *DeMarcos*, 149 F. 2d 23, 26 (App. D. C. 1945), cert. den. 325 U. S. 889, rehearing den. 326 U. S. 805, an appeal in a habeas corpus proceeding, the court declared:

> "During the hearing the petitioner was represented by counsel. Nevertheless the court permitted petitioner to conduct the trial while his counsel sat silent. This is an undesirable practice. Where a party is represented by competent counsel his case should be conducted by that counsel unless it becomes apparent that the interests of justice require the party's active participation *pro se*. Such circumstances are rare and were not present in this case."

POINT FOUR

The prosecutor's review of the evidence on summation contained no prejudicial error.

In his summation, the Assistant United States Attorney prosecuting the case reviewed the evidence, pointing out that the defendant had bought technical grade chloroform which did not conform to USP specifications, and had not re-worked it, but then came to explain how samples had been approved by the Government chemist, the one real hurdle in the entire case. The paragraph in which he explained it is set forth in appellants' brief as follows:

> "Now, I don't know how Mr. Carey got to the Agency the five new samples which bore Lot 2081, but I do know where it came from. I know that it was U. S. P. chloroform and I know that it came from McKesson & Robbins. If you will look at the exhibits in this case you will find that on March 19, 1952, exactly five days before the second group of samples were sent in to the laboratory, Mr. Carey obtained 3,000 pounds of U. S. P. chloroform from McKesson & Robbins. That is the source of the chloroform which he submitted as the second group of samples" (P. 34 of Summations, P. 29 of Appellants' Brief).

It is clear from reading this excerpt alone that the Assistant United States Attorney was not trying to indicate that he had any special knowledge, because he explains how his knowledge was derived. If there is any doubt on this score, it is completely dispelled by reading the entire summation which shows that he was merely

reviewing the evidence, which showed that the McKesson & Robbins chloroform was the only chloroform meeting USP specifications which was available to Private Brands, Inc. at that time, and further showed that the samples submitted to the Government laboratory for testing did meet USP specifications. The court's charge furthermore told the jury that what counsel said was not evidence (324a).

In context, the comments obviously were intended to be and were understood as a conclusion to be drawn from the evidence.

> ". . . The district attorney has the right to summarize the evidence and urge upon the jury all reasonable inferences and deductions from the evidence. It is not misconduct on his part to *express* his individual belief in the guilt of the accused if such belief is based solely on the evidence introduced and the jury is not led to believe that there is other evidence, known to the prosecutor but not introduced, justifying that belief.
>
> • • • • •
>
> ". . . it must be remembered that in the closing argument to a jury, the government attorney is an advocate, as is counsel for defense, and proper oratorical emphasis is denied to neither."

Henderson v. *United States*, 218 F. 2d 14, 19 (6th Cir. 1955), cert. den. 349 U. S. 920.

The summation is not objectionable just because the prosecutor used the words "I know". *United States* v. *Klein*, 187 F. 2d 873, 876 (7th Cir., 1951), cert. den. 341 U. S. 952.

There is no comparison between the instant case and *Berger* v. *United States*, 295 U. S. 78 (1935), cited by appellants, where the Supreme Court said at page 89:

> ". . . We have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential."

The Assistant United States Attorney was well within the proper bounds of summation, and appellants' attempt to assign his argument as error must necessarily fail in light of the authorities cited.

POINT FIVE

No error can be predicated on the charge of the Trial Court.

The Trial Judge commenced his charge to the jury by stating that the indictment was merely a charge and not evidence, and read the text of Title 18 United States Code, §1001, which appellants were alleged to have violated (323a). He explained the burden of proof and defined reasonable doubt. He commented on the character testimony, discussed the nature of the evidence, and told the jury that they were the sole judges of the facts (324a-325a).

He then read Counts One and Six of the indictment substantially in full and summarized the remaining counts (325a-329a). In commenting on the evidence, he read certain excerpts from Hendrixson's testimony and sum-

marized the evidence as to re-working of the chloroform. The jury was given the essential elements of the offense in the Court's charge and appellants raised no objections or exceptions to the charge. No reversible error was therefore committed.

A. There Was No Error or Deficiency in the Court's Charge.

1. The Court's Comments on the Evidence Presented Were Entirely Proper

Appellants complain of the quotation by the Court from the testimony of the Government witness Hendrixson. This quotation takes up less than two of the ten pages comprising the charge of the Court. The portion of Hendrixson's testimony which was quoted was, in substance, that the Dupont Company did not manufacture USP chloroform during the period in question, that Dupont technical chloroform differed from USP chloroform, and how it differed. As to these items, the evidence was uncontradicted. Certainly, appellants were not in any way prejudiced by this.

The Trial Judge made it clear that he was not taking the case from the jury and that they were the sole judges of the facts. He said:

> "One, you pass on the facts, you determine the facts, and neither what counsel may have said in their summations in respect to their understanding of the facts, nor indeed what I may say in my charge concerning what the evidence is, need conclude you. You are the sole judges of the facts.
>
> "Secondly, you also pass upon the credibility of witnesses." (324a-325a)

In so charging, he brought himself within the rule of *United States* v. *Chiarella*, 184 F. 2d 903, 908 (2nd Cir., 1950), vacated as to sentence, 341 U. S. 946 (1951), wherein the court stated that a judge may express his opinion of the evidence, "provided he makes it plain to the jury that they need not agree with him, which in the case at bar the judge did very explicitly in his charge."

2. The Court's Failure to Define "Wilfulness" and Explain Criminal Intent in the Absence of a Request to Do So Was Not Error.

In summation, counsel for appellants, after reading the applicable paragraph of Title 18 United States Code, §1001, to the jury, argued that there was "no scintilla of evidence, written or oral in this case which directly proves that Mr. Carey, the individual defendant, or for that matter the corporation, knowingly and wilfully made any false statement" (26). Counsel for the Government in answer pointed out that the evidence showed that the fraud was deliberate and intentional once appellants had knowledge that the chloroform did not conform to USP standards, and that Carey had endeavored to cover up and conceal his fraud through false statements of his own and those of Ehrlich and Carpinelli. Judge Galston read §1001 to the jury but was not asked to and did not define the words "wilfully and knowingly". However, he did read Counts One and Six of the indictment, including specifically that part which charged that the defendants did knowingly and wilfully use a false statement, "and that such statement was false and fraudulent as the defendants then and there well knew" (326a). The learned Trial Judge further explained that these Counts were substantially repeated in the other Counts (327a-328a).

The jury clearly knew that it could convict only if appellants knew the statements were false and deliberately made them with intent to deceive. It would therefore have been superfluous for the Court to have defined the words "wilfully and knowingly." The failure to do so was not error.

In *American Surety Co.* v. *Sullivan*, 7 F. 2d 605, 606 (2nd Cir., 1925), Judge Learned Hand said:

> "The word 'willful, even in criminal statutes, means no more than that the person charged with the duty knows what he is doing."

And in *United States* v. *Capitol Meats*, 166 F. 2d 537 (2nd Cir.), cert. den. 334 U. S. 812 (1948), a case involving a violation of the Emergency Price Control Act, the court said at pages 538 and 539:

> "Consequently, if it appears that the jury understood that the accused were guilty only if they knew that they were selling above the ceiling price, the essential element of the crime was submitted for determination by the jury."

Clearly, in the instant case, the word "willful" had no obscure meaning. The jury was well aware both from summations and from the statute and from the indictment, that they could not convict appellants unless they were convinced that the fraud was deliberate and intentional.

The Court read Count Six to the jury in which the meaning of "concealment by device" was so clearly spelled out in the indictment as read to the jury that any juror could follow and understand it (32ja-328a).

In *Wheeler* v. *United States*, 190 F. 2d 663 (D. C. Cir., 1951), the defendant urged that the jury was not adequately instructed on the elements of the crime, although the statute had been read to them. There the Court said:

> "This was sufficient. The language of this statute is clear and concise, it contains no words which are obscure, ambiguous or which are used in some restricted, special, or technical sense which the average layman cannot be expected to understand."

The same may be said of the statute at hand.

3. The Failure to Charge Presumption of Innocence Was Not Error in the Absence of a Request to So Charge.

After reading §1001 to the jury, the Court charged:

> "Now the burden of proving guilt is upon the Government, and that burden consists of proving guilt beyond a reasonable doubt." (324a)

There was no request by appellants for a charge on presumption of innocence and no exception was taken to the Court's failure to charge it. In *United States* v. *McGuire*, 64 F. 2d 489, 493 (2d Cir., 1933), this Court held:

> "The court in its instructions to the jury failed to mention the presumption of innocence. The omission was not called to its attention, nor was any exception taken. No reversible error has therefore been shown."

Appellants cite *Coffin* v. *United States*, 156 U. S. 432 (1895) in support of their argument. There, however, there was a specific request to charge presumption of innocence and a refusal to do so on the part of the Trial Court.

Finally, in *Spevak* v. *United States*, 158 F. 2d 594, 598 (4th Cir., 1946), cert. den. 330 U. S. 821 (1947), the Court held:

> "On the third question, it appears that the learned trial judge did not mention the presumption of innocence in his charge to the jury, although he did charge fully and correctly on the doctrine of reasonable doubt. No request was made of him to charge on the presumption of innocence, however, and no exception was taken to the failure to so charge; and it is well settled that such failure is no foundation for error on appeal in the absence of request or exception."

B. Appellants' Failure to Request the Charges Omitted or to Take Exception to the Charge as Given Bars Any Claim of Error.

Rule 30 of the Federal Rules of Criminal Procedure reads in part as follows:

> "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

The reasons for this rule are well set forth in *United States* v. *Vasen*, 222 F. 2d 3, 5 (7th Cir., 1955), cert. den. 350 U. S. 834, where in affirming a conviction, the Court declared:

> "Rule 30 of the Federal Rules of Criminal Procedure, 18 U. S. C. A., prescribes the time and place for making objections to instructions. In the absence of compliance with this rule, defendants are precluded from reviewing the action of the court.

> • • • Other courts have consistently decided likewise. • • • This rule is, in its essence, the same as that of Rule 51 of the Rules of Civil Procedure, 28 U. S. C. A., as to which it has repeatedly been declared that 'the purpose of requiring objections is to insure that the trial judge may be advised of possible errors upon his part and to give him an opportunity to correct them. For this reason, any objection must be fairly and promptly directed to the trial court in order that errors may be avoided. • • • In other words the court must be given an opportunity to rectify any inadvertent wrongful charge, statement or ruling. • • • This reasoning applies to every instance of assigned error where the action of which complaint is made is such that, if called to the court's attention, it might have been corrected. This includes rulings in the course of the trial, comments of the court and instructions to the jury. In all such instances common fairness requires that before it can be successfully contended on appeal that the trial court has erred, that court must have been given an opportunity to rectify any inadvertent comment, ruling or instruction."

Appellants were represented by counsel and had full opportunity to avail themselves of this rule. They failed to do so, and therefore the omissions which they complain of may not now be assigned as error. The words of this Court in *United States* v. *Campisi*, — F. 2d —, decided on September 9, 1957, with reference to an omitted instruction, seem particularly applicable to the case at Bar:

> "The omission was at most an inadvertence. Had appellant requested such an instruction, or excepted on that ground to the charge as given, we have no doubt the trial judge would have supplied the omis-

sion and the verdict would have been the same. But no exception was taken, no such request was submitted and appellant's counsel indicated no criticism whatever of any part of the charge. To reverse on such a point as this would be a travesty of justice."

POINT SIX

The indictment is not multiplicitous.

Appellants urge that the indictment is multiplicitous because each false statement is alleged as a separate count. They contend that only one crime was committed since all the statements were made in connection with a single transaction.

A. Each Count Properly Charges a Separate Crime.

Sixteen invoices containing false statements were presented to the government for payment. Each of the counts one to five and eleven to twenty-one of the indictment was based on a false statement in a different document (178a, Ex. 54). It was necessary to prove a separate signature on each document. The documents bore nine different dates, and each covered a separate and distinct shipment. Each of the counts required proof of different facts, and each therefore properly set forth a separate crime. In *Doherty* v. *United States*, 193 F. 2d 487, 488 (10th Cir. 1951), the court stated:

> "The required test for determining whether two or more counts in an indictment charge separate offenses or only one is whether each count requires proof of a fact or element not required by the other."

In *Berg* v. *United States*, 176 F. 2d 122, 125, 126 (9th Cir. 1949), cert. den. 338 U. S. 876, the court affirmed a denial of a writ of error coram nobis brought in an effort to obtain a modification of sentence on the theory that an indictment which charged in separate counts the making of false entries on the records of an interstate carrier was multiplicitous, and held that

> "The falsification of the several entries was punishable in each instance as a separate crime. Each entry required proof of additional facts, in order to establish the separate crime, whether made on the same report or different reports."

In *United States* v. *Marzani*, 71 F. Supp. 615, 618 (D. C. D. C. 1947), affd. 168 F. 2d 133 (D. C. Cir. 1947), 335 U. S. 895, 336 U. S. 653, it was held that

> "Each count of the indictment charges an offense different from the others either from a standpoint of time when the alleged false and fraudulent statements were made or with respect to different governmental agencies. The test of double jeopardy through a multiplicity of counts is whether a conviction on one count and an acquittal on another would bring about a contradiction on the face of the verdict."

It is clear, therefore, that each of counts one to five and eleven to twenty-one states a separate crime.

Counts one to five charge the making of false statements, and counts six to ten charge concealment by device of the fact that the chloroform shipped under lot #2081 was the same chloroform that had been rejected under lot #2049. Counts six to ten obviously required elements of proof not necessary under counts one to five.

This court, in *United States* v. *Uram*, 148 F. 2d 187, 190 (2d Cir. 1945), upheld a conviction on both counts of a two count indictment, saying,

> "The charge that counts one and two are for the same alleged crime, is without merit. They state two separate and distinct fact basis,—one, that the loan was obtained on the misrepresentation that the proceeds would be used for reconstruction purposes, when they were to be used for other unrelated purposes, and second, the concealment of the fact that a prior loan was unpaid. One was a negative act. The other was a positive act. They did not even concern the same facts. As to the violation of separate statutes, since the same evidence was not required for the proof of each crime, both charges may be upheld, even though both crimes grow out of the same general transaction."

The instant case differs from *In Re Snow*, 120 U. S. 274 (1887), cited by appellants. There the offense of cohabiting with more than one woman at the same time was held to be a continuing offense and separate counts could not be alleged for each year of such cohabitation. It also differs from *United States* v. *Universal C. I. T. Credit Corp.*, 344 U. S. 218 (1952), where the court held, after examining the statutory history, that Congress intended that the violation of the minimum wages act to constitute one offense, i. e., a course of conduct, regardless of the number of employees not paid such wages.

B. By Failing to Object to the Form of the Indictment Prior to Trial, Appellants Waived Any Defects.

Prior to trial, appellants moved for inspection of the grand jury minutes, but made no other motions directed

toward the pleadings (1a-2a). The question of multiplicity was not raised untill after conviction.

Rule 12(b)(2) provides in part as follows:

> "Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver."

Appellants having failed to raise objections to the form of the indictment prior to trial, are now precluded from so doing. *Anderson* v. *United States*, 189 F. 2d 202 (6th Cir. 1951). There the court said, at page 204,

> "In making four out of one offense the indictment is unduly split and multiplied • • • and if timely objection to the indictment had been made, it should have been quashed. However, no objection to the indictment was raised until the hearing in this court. The objection now made does not attack the court's jurisdiction nor assert that the indictment does not charge an offense. It should have been made by motion before trial. • • • Because of failure to present the objection as required, it is waived. Also since the sentences upon the four counts run concurrently, and since the five-year sentence imposed in each case falls within the statutory limitation • • • as a practical matter appellant's penitentiary term will be the same as though the crime had been charged

in one count. He is not prejudiced, and this contention has no merit."

Under the statute in the case at bar, appellants could have been fined $10,000 on any one count, and the appellant Carey could have been imprisoned for up to five years or both (18 U. S. C., §1001). However, appellants were each fined only a total of $2100.00 and the appellant Carey was given a suspended sentence and placed on probation for one year. This punishment was substantially less than that which appellants might have received for a conviction on only one count of the indictment. It is therefore evident that appellants have not been in any way prejudiced or subjected to an illegal sentence, and there is no cause for relief from the waiver. *United States* v. *Perplies*, 165 F. 2d 874, 877 (7th Cir. 1948).

CONCLUSION

The appellants had a fair trial. The evidence amply supported the verdict and the contentions of appellants are without merit. The judgments of conviction should, therefore, be affirmed.

Respectfully submitted,

CORNELIUS W. WICKERSHAM, JR.,
United States Attorney.

MARIE L. MCCANN,
Assistant United States Attorney,
Of Counsel.

October 6, 1957

APPENDIX

Excerpts from Trial Minutes

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Cr. #43769

UNITED STATES OF AMERICA

vs.

PRIVATE BRANDS, INC., and FRANCIS P. CAREY,
Defendants.

Brooklyn, New York,
January 27, 1955.

Before:—

HONORABLE CLARENCE G. GALSTON, U. S. D. J.

APPEARANCES:

LEONARD P. MOORE, Esq.,
United States Attorney for the
Eastern District of New York,
By RICHARD C. PACKARD, Esq.,
Assistant United States Attorney,
For the United States of America.

JEREMIAH DRISCOLL, Esq.,
Attorney for Defendants.

Excerpts from Trial Minutes

The Clerk: Private Brands, Inc. and Francis P. Carey.

Mr. Packard: May it please the Court, the Government is ready for trial.

Mr. Driscoll: May it please the Court, the defendants are not ready. I would like an adjournment of three or four weeks. I told the District Attorney that the District Attorney has in his possession a lot of the corporation's files which I have to have for preparation for trial. I spoke to Mr. Packard last week when he notified me that it was going to be on for the 24th.

He said I could come over and sit in his office and look at them.

I think I am entitled to have the records or photostats of the records, rather than at his request come over and sit in his office for a couple of days.

The Court: I agree with him. You can come over and look at them here.

Mr. Driscoll: All right. That will take me, as far as I know, maybe two or three days just to look at those files and make copies for my own information and preparation, and there are certain documents that my clients are trying to find. I don't know whether they have them or whether the Government has these particular files that I have to have and see.

The Court: What is the nature of the indictment?

Mr. Packard: It involves, briefly, fraud in connection with a Government contract which the defendant corporation had with an armed services agency.

The Court: When was the indictment filed?

Mr. Packard: The indictment was filed on December 8th before Judge Inch, your Honor, and at that time the defendant appeared and Mr. Driscoll, his attorney, appeared and I stated in open court that the Government

would be ready and expected to go to trial on January 24th.

At that point, Judge Inch adjourned the case until the 24th of January for trial. Trial notices were sent out on the 14th of January and it was subsequent to that that Mr. Driscoll telephoned me and requested an adjournment. I said that I would not acquiesce in the request.

Then on Wednesday, the 19th, in the afternoon Mr. Driscoll telephoned me. I was out, so he talked to my secretary and said that we had certain corporate records which he told her he needed to examine.

I telephoned Mr. Driscoll the next day and told him that he was at liberty to come to my office at any time and examine the records as long as he wished, and I told him that I would even be there myself and would have the records available at any time during the weekend, if that was more suitable to him.

Therefore, if your Honor pleases, I believe that the request for an adjournment is without merit and I respectfully oppose it.

The Court: I agree with you. If you can't go on today, I will set it for tomorrow.

Mr. Driscoll: Well, Judge, I couldn't make copies of all these files.

The Court: You don't have to make copies. You can make memoranda, and the delay has been wholly your fault, not the Government's.

Mr. Driscoll: If your Honor please, I made a motion to inspect the grand jury minutes which he didn't mention. I made a motion to inspect the grand jury minutes. It was argued before Judge Inch, as I recollect—I may

be wrong on that—and that was denied, and I was served with an order on the 7th of January. I won't go into that, but——

The Court: Well, Mr. Packard, you should be willing to grant a reasonable adjournment.

Mr. Driscoll: That is all I am asking for.

The Court: What do you suggest?

Mr. Packard: Well, as I say, the Government is ready today. Your Honor just suggested that tomorrow might be a suitable date. I believe that that would be considered—I would consider that reasonable, but any adjournment beyond tomorrow——

The Court: Well, tomorrow is Friday.

I will set it for Monday for trial, Mr. Driscoll.

Mr. Driscoll: All right, your Honor.

I will go over today, Mr. Packard. Will you be in your office on Saturday if I have to go in and look at your records on Saturday?

Mr. Packard: Yes, Mr. Driscoll.

The Court: January 31st.

Mr. Packard: May I respectfully suggest, your Honor, that the jury be selected?

The Court: No, we have got other cases. I can't do that. There may be another case ready.

Mr. Brisach: There will be no other case ready for trial today.

The Court: Well, how about tomorrow?

Mr. Brisach: No, sir; the calendar has been kept clear for this particular case.

The Court: I think we better set it over until Monday so as to give the attorneys an opportunity to see the corporate records.

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Supreme Court of the United States

October Term, 1957

No. 727

PRIVATE BRANDS, INC. and FRANCIS P. CAREY,
Petitioners,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ARCHIBALD PALMER,
Attorney for Petitioners,
320 Broadway,
New York, N. Y.

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Supreme Court of the United States

October Term, 1957

No.

PRIVATE BRANDS, INC. and FRANCIS P. CAREY,
Petitioners,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioners respectfully ask this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit which affirmed their conviction for violations of Section 1001, Title 18, U. S. C., upon twenty-one counts of the indictment.

(a) The Opinions Below.

No opinion was rendered by the District Court.

The opinion of the Court below has not yet been officially reported; a copy thereof is hereto annexed as an appendix.

(b) Statement of Grounds of Jurisdiction.

1. The judgment of the Court of Appeals was rendered and entered on December 19th, 1957.

2. No application for a rehearing has been made.

3. The jurisdiction of this Court is invoked pursuant to 18 U. S. C., Rule 37, and 28 U. S. C., Section 1254.

(c) Questions Presented for Review.

1. Whether the individual petitioner was unjustly deprived of his constitutional right to dispense with a lawyer's help and to represent himself at the trial in the District Court, where the motion to represent himself was made in good faith, prior to the impanelling of a jury, at the opening of the day set for trial and cogent reasons therefor were given to the Trial Court indicating that the individual petitioner had made such request with full cognizance of the legal consequences of his choice, and where no disruption of the Court's business would have been thereby entailed.

2. Whether the individual petitioner was deprived of a fair trial by the Trial Court's refusal to permit him to conduct the examination and cross-examination of certain witnesses with respect to highly technical matters pertaining to a field of chemistry in which the individual petitioner was eminently qualified and his counsel admittedly had no experience or technical knowledge, when the Trial Court had indicated at the beginning of the trial that it would permit the individual petitioner to conduct such examination if the necessity therefor became apparent.

3. Did the Government make out a case for submission to the jury where it failed to submit any evidence whatsoever to prove that the chloroform delivered by petitioners was defective at the time of delivery and that peti-

tioners knew of any defects in such chloroform, and where the only proof adduced by the Government showed that this chloroform complied with the specifications of the contract between the corporate petitioner and the Government in all respects at the time of delivery.

4. Whether petitioners were deprived of a fair trial by the conduct of the prosecuting attorney in making statements in the form of assertions of personal knowledge, which were utterly without foundation in the record, in the course of his summation.

5. Was the Trial Court's charge adequate where the charge entirely failed to define the elements of the offense charged against petitioners and, particularly, where it failed to include the fundamental rule of presumption of innocence.

(d) Statutes Involved.

Title 18, United States Code, Section 1001. *Statements or Entries Generally.*

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Sixth Amendment to the United States Constitution.

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation;

> to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Title 28, United States Code, Section 1654. Appearance personally or by counsel.

> "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel, as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

(e) Statement of Case.

The indictment herein was filed on December 2, 1954 and petitioners were arraigned on December 8, 1954 at which time a notice of appearance was filed on behalf of petitioners by Jeremiah Driscoll, Esq. (App. 2a).*

The indictment contains twenty-one counts, all of which stem from a contract identified by Agency #36603 entered into on or about December 26, 1951 between the Armed Services Medical Procurement Agency and the corporate petitioner, Private Brands, Inc. (App. 6a-21a). Counts 1 through 5 and Counts 11 through 21 of the indictment are based upon sixteen separate shipments of chloroform made in accordance with the terms of this contract and allege that petitioners knowingly and wilfully issued a false document, to wit, a bill of Private Brands by submitting the said bill to the Agency for payment knowing that said bill contained false and fraudulent entries, to wit, that there were being shipped bottles of "chloroform, 1 lb. U.S.P.; Do not use for anesthesia" and further containing allegedly false and fraudulent statements to wit: "I certify that the above bill is correct and just and that payment therefor has not been received. Private Brands,

* The references are to the appendix in the court below.

Inc., (sgd.) F. P. Carey, F. P. Carey—President." The only variation between these counts is in the date of the bills submitted by the corporate petitioner, the destination of the shipment, and the number of bottles shipped.

Counts 6 through 10 of the indictment exactly parallel the first five counts of the indictment and allege further that petitioners knowingly and wilfully concealed by a device a material fact, to wit, that the chloroform identified in said bills by the contractor's Lot #2081 was allegedly a portion of a lot of chloroform which had been rejected by the Agency, identified by the contractor's Lot #2049. Each of the alleged wilful concealments (Counts 6 through 10) was contained in the bills which are the basis of Counts 1 to 5 of the indictment respectively.

On December 15, 1954, a motion was made by petitioners for an inspection of the Grand Jury minutes, which motion was denied by order dated January 7, 1955 (App. 1a). Despite petitioners' counsel's request for an adjournment in order to prepare the case for trial, petitioners were forced to trial on January 31, 1955, less than two months from the date of arraignment and only twenty-four days after the entry of the order denying petitioners' motion for an inspection of the Grand Jury minutes.

The case was tried before the Hon. Clarence G. Galston and a jury. Prior to the selection of the jury, a motion was made by Jeremiah Driscoll, Esq., who had entered a notice of appearance on behalf of both petitioners, for permission to withdraw as attorney for the individual petitioner, Francis P. Carey, and requesting permission for the said individual petitioner to defend himself personally at the trial (App. 41a-42a). In response to the Court's inquiry as to the reason for this motion, the individual petitioner stated that he had not had sufficient time to prepare the case with his counsel and to coach him with respect to the technical aspects of the case, which involved a specialized field of chemistry. The Court denied

this motion (App. 42a). Thereupon the individual petitioner requested permission to conduct the cross-examination of certain witnesses on technical subjects. The trial judge reserved decision on this request (App. 42a-43a).

The Government introduced testimony at the trial showing that the individual petitioner, Francis P. Carey, was the President of Private Brands, Inc., which was engaged in the contract packaging business. On December 26, 1951, Private Brands, Inc. was awarded a contract by the Armed Services Medical Procurement Agency for 25,824 one pound bottles of chloroform of U.S.P. quality, which contract was given Agency #33603 (App. 46a, 50a, 52a).

The term "U. S. P. quality" was defined by Philip R. Hendrixson, an expert witness called on behalf of the Government, as designating chloroform which meets all of the specifications listed in the U. S. Pharmacopeia for testing the quality of chloroform (App. 81a). This witness indicated that the technical grade of chloroform manufactured by his employer, E. I. DuPont & Co. (from whom Private Brands had purchased the bulk of the chloroform for the fulfillment of its contract [App. 115a, 116a]) differed in certain respects from U. S. P. standards (App. 81a-85a).

Private Brands' records showed that it had purchased 55,900 pounds of technical chloroform from DuPont & Co. and 3,000 pounds of U. S. P. chloroform from McKesson & Robbins between February 6, 1952 and May 5, 1952 (App. 115a, 116a).

The first lot of chloroform was completed by February 18, 1952 and on that date a Government inspector, one Ronald Filera, who testified as a Government witness at the trial, appeared at the plant of Private Brands, Inc. to inspect said chloroform at its source in accordance with the provisions of the Government contract. Mr. Filera testified that he selected five samples of this first lot at random

and sealed them under heat with a green adhesive Government seal in order to prevent tampering, and that these samples were then sent to the Agency laboratory for testing (App. 99a-105a). On February 29, 1952, these samples were rejected by an Agency laboratory report showing deviations from the specifications of contract #33603, including a technical deviation for mislabeling (App. 58a, 59a).

After these deviations had been remedied, and a new label bearing lot #2081 had been affixed over the original label bearing lot #2049, in order to correct the deviation for mislabeling, the Government was notified and Mr. Filera again inspected this chloroform at Private Brands, Inc. On March 24, 1952, he selected five samples of this second lot at random and affixed his green seal to said samples, which were then mailed to the Government laboratory for testing (App. 106a). These samples were found to be in full compliance with U. S. P. specifications and were accepted by the Government and thereupon Private Brands, Inc. was authorized to make shipment of this chloroform to various designated Government depots (App. 67a, 106a, 138a).

On February 20th and again on March 4, 1952, the Government exercised the optional increase clause contained in Contract #36603 and ordered an additional total of 23,654 bottles of chloroform which were prepared by Private Brands and given lot #2105 (App. 64a, 65a). Five samples of this lot were again selected at random by Mr. Filera on May 12, 1952 and sealed with his seal, and the Government laboratory report of May 17, 1952 showed full compliance with U. S. P. specifications (App. 139a).

The initial shipment by Private Brands was made on April 19, 1952 and the final shipment was made on June 10, 1952. In the latter part of August 1952, more than four months after the initial shipment, twelve bottles of chloroform allegedly bearing lot #2081 were returned from

Fort Totten for testing when visible floating particles were observed in these bottles, and certain deviations from U. S. P. specifications were allegedly discovered at that time (App. 140a). Thereafter other bottles of chloroform bearing lot #2081 and lot #2105 were returned from other Army depots between October 1953 and April 1954 and samples of these, when tested, allegedly showed deviations from U. S. P. specifications (App. 143a-145a, 149a).

Upon the basis of these tests, the Government attempted to prove that the chloroform delivered to the Government between April 19th and June 10, 1952 failed to comply with U. S. P. specifications at the time of delivery and that petitioners knew of such noncompliance, despite the fact that the samples submitted to the Government for testing had shown full compliance with all U. S. P. specifications.

Petitioners endeavored to show that the tests taken by the Government of chloroform sent to its laboratory four months after shipment by Private Brands, and as late as two years after shipment by Private Brands, were not indicative of the quality of this chloroform at the time of its delivery to the Government. To this end a foundation was laid to enable an impartial expert witness, William Bechtoldt, an analytical chemist employed by the firm of Bendiner & Schlesinger, to testify with respect to the results of tests conducted by the independent laboratory by which he was employed which would have shown that the alleged deviations discovered in this chloroform long after delivery were attributable to a chemical interaction with the sealable enclosure specified by the Government in its contract with Private Brands.

Thus, petitioners introduced testimony through Philip Nossal, an employee of Ferdinand Gutmann & Company, the firm which supplied the bottle caps and Filmaco inner-seals which were used by Private Brands in compliance with the specifications contained in this contract with the

Government (App. 253a, 254a, 117a). Mr. Nossal testified with respect to the nature of the caps furnished by Gutmann & Company and described them as consisting of a metal cap with a liner and a transparent inner seal (App. 259a, 260a). He explained that the transparent Filmaco inner seal is caused to adhere to the lip of the bottle by an adhesive application applied by the packer to the lip of the bottle (App. 268a). He further testified that even under the most favorable application of this adhesive to the lip of the bottle some of this adhesive must naturally be squeezed toward the inside of the bottle and would therefore come in contact with the contents of the bottle and that this would necessarily happen even though the sealing operation was properly performed (App. 268a, 269a).

The testimony of Louis E. Horvath, an employee of Private Brands, showed that all of the bottles of chloroform shipped to the United States Government, pursuant to Contract No. 36603, were sealed with caps and sealable enclosures supplied by Ferdinand Gutmann & Co. (App. 267a). He further testified that on or about April 10, 1952, he had sent some Gutmann sealable enclosures and a bottle of Filmoseal glue to the firm of Bendiner & Schlesinger (App. 310a). Petitioners were prevented from putting in evidence, through the testimony of Mr. Horvath, a bottle of U. S. P. chloroform purchased from another chemical concern (App. 289a), which had been sent by Private Brands to Bendiner & Schlesinger for testing (App. 300a) for the purpose, expressed by petitioners' counsel, of showing the interaction of this chloroform with the Gutmann seal (App. 286a).

The witness, William Bechtoldt, was then qualified as an expert on chemical analysis. The Court prevented petitioners' counsel from eliciting any testimony from Mr. Bechtoldt, as a chemical expert, with respect to the possible chemical interaction between the contents of a bottle of chloroform and this Gutmann cap and the adhesive used

with the Filmaco innerseal specified in the Government contract (App. 316a-318a, 75a).

Mr. Bechtoldt, however, testified that technical chloroform purchased from the Dupont Company might pass every test prescribed by the U. S. P. standards and pass as U. S. P. quality chloroform (App. 319a), and that a finding of specific gravity of 1.480 in the course of testing, instead of the maximum specific gravity of 1.478 prescribed by the U. S. P., might be due to a slight experimental error in the testing procedures (App. 319a).

At the close of the Government's case a motion was made on behalf of petitioners to dismiss the indictment. This motion was denied (App. 231a).

During the course of petitioners' case petitioners' counsel renewed the motion which he had made at the commencement of the trial to withdraw as counsel for the individual petitioner and to permit the individual petitioner to represent himself. At the same time a specific request was made to the Court for permission to have Mr. Carey examine a defense witness. The Court denied this motion in all respects (App. 276a, 277a), as it had previously denied Mr. Driscoll's request to permit Mr. Carey to cross-examine the Government witness Philip R. Hendrixson (App. 85a).

The jury found both petitioners guilty on all twenty-one counts (App. 332a through 335a). A motion was made by petitioners to extend the time to make a motion for a new trial (App. 22a through 36a). Said motion was denied by the Trial Court (App. 336a). Each of petitioners was thereupon sentenced to a fine of $100 on each of the twenty-one counts and the imposition of a prison sentence was suspended against the individual petitioner and he was placed on probation for one year (App. 337a, 37a, 39a). Both petitioners appealed from said judgments (App. 339a through 342a). Upon appeal the judgment of the Trial Court was affirmed by the Court of Appeals.

(f) Jurisdiction of the Courts Below.

The District Court had jurisdiction under Title 18, U. S. C., Section 1001.

The Court of Appeals had jurisdiction under Title 28, U. S. C., Section 1291.

(g) Reasons Relied On.

As to Questions 1 and 2:

The Court below accepted the general principle enunciated in the case of *Adams* v. *United States*, 317 U. S. 269 at 279, that an accused has the constitutional right to the assistance of counsel and the correlative right to dispense with a lawyer's help, but then departed from this principle for reasons which were demonstrably unjustified.

At the opening of the day set for trial and before a jury had been impanelled a motion was made by petitioners' counsel, Jeremiah J. Driscoll, Esq., requesting that he be permitted to withdraw as attorney for the individual petitioner and that the individual petitioner be permitted to represent himself. In response to the Trial Court's inquiry, the individual petitioner, Francis P. Carey, stated the reasons underlying this motion to the Court. Mr. Driscoll had been retained approximately seven weeks before to represent the defendants and during the first month of his retention had been occupied with a motion for inspection of the Grand Jury minutes which was not decided until a month before the trial. The subject matter of the indictment involved extremely technical matters in the field of chemistry and the individual petitioner had not had sufficient time to coach his counsel with respect to these technicalities so that he would be enabled to conduct the necessary examination and cross-examination of witnesses at the trial. Furthermore, the individual petitioner clearly indicated his dissatisfaction with his counsel and his strong

desire to conduct his own defense (App. 42a). Nevertheless, the Trial Court denied this motion and refused to release Mr. Driscoll from his assignment (App. 42a), but when the individual petitioner requested permission to conduct the examination of certain of the witnesses on technical subjects, the Trial Court indicated its willingness to grant such permission if the circumstances dictated such necessity (App. 43a).

The record of this trial indicates clearly that the individual petitioner was justified in his lack of confidence in his counsel's ability to grasp the fundamentals of chemistry which were necessary for the purpose of conducting this trial in an orderly and effective manner. Throughout the trial, Mr. Driscoll floundered in a bewildering sea of esoteric terminology, chemical symbols and technical data with which he was almost completely unfamiliar, a situation which was aggravated by the fact that he had been accorded an unusually short time within which to prepare this case for trial.

On many occasions during the course of the trial, Mr. Driscoll was completely frustrated in his efforts to demonstrate a point which depended upon a fundamental knowledge of chemistry, and on at least one occasion, the Trial Court gave passing recognition to this ineptitude when it stated as follows:

> "The Court: I will overrule the objection.
>
> You have got to make some progress here. You seem to be spending an immense amount of time between questions and then there is difficulty on the part of the witness to understand the question, difficulty of the Court to understand what the question is directed to.
>
> I don't wonder you object, but nevertheless we have got to get along here somehow." (App. 242a)

Being cognizant of his ineffectuality, Mr. Driscoll attempted to avail himself and the individual petitioner of the Court's expressed willingness to permit the individual

petitioner to conduct cross-examination when the circumstances indicated such necessity. However, the District Court refused to grant such permission (App. 85a), although the witness's testimony had dealt almost entirely with technical matters in the field of chemistry. Later in the course of the trial, Mr. Driscoll renewed the motion which he had made at the commencement of the trial for permission to withdraw as counsel for the individual petitioner and for the individual petitioner to represent himself. He further requested permission for the individual petitioner to conduct the examination of a technical witness and the Court denied this motion in all respects, despite Mr. Driscoll's explanation that he had found it impossible to obtain the necessary technical background in the time allowed to him before the trial (App. 276a, 277a).

Again in his summation, Mr. Driscoll indicated his own feeling of ineptitude with respect to his handling of the various technical matters which he had attempted to get in evidence, both on direct and cross-examination, when he stated as follows:

> "I know I tried the patience of the Court, but I tried to do what I could. I put many witnesses on, I didn't get very far. Indeed, in some cases I didn't get anywhere, but I did the best I could." (p. 22 of Summations.)

and again at the closing of his summation as follows:

> "• • • Let me say, in closing and to reiterate, you may think of me, if you want to, of doing a bad job, a poor legalistic job, but don't because of that find my man guilty." (p. 27 of Summations.)

Upon the argument of the appeal, Mr. Driscoll appeared, together with new counsel for petitioners, and frankly stated to the Court that due to his complete unfamiliarity with chemistry and the difficult technical questions involved in the trial, he felt that he had been unable to defend Mr. Carey properly.

Upon consideration of the facts as above set forth, it is respectfully submitted that the Court below has rendered a decision directly in conflict with the ruling of this Honorable Court in the *Adams* case. Nor has any valid reason been given for its departure from the accepted principle that an accused has the constitutional right to the assistance of counsel and the correlative right to dispense with a lawyer's help.

In the *Adams* case, this Court stated:

> "The right to assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms. They rest on considerations that go to the substance of an accused's position before the law. The public conscience must be satisfied that fairness dominates the administration of justice. An accused must have the means of presenting his best defense. He must have time and facilities for investigation and for the production of evidence. But evidence and truth are of no avail unless they can be adequately presented. Essential fairness is lacking if an accused cannot put his case effectively in court. But the Constitution does not force a lawyer upon a defendant. He may waive his Constitutional right to assistance of counsel if he knows what he is doing and his choice is made with eyes open. Johnson v. Zerbst, 304 U. S. 458, 468, 469, 58 S. Ct. 1019, 1024, 1025, 82 L. Ed. 1461."

Despite this Court's holding that "the Constitution does not force a lawyer upon a defendant" the Trial Court, in the instant case, did, in effect, force Mr. Driscoll upon the individual petitioner herein.

The Court below relies on *United States* v. *Mitchell*, 138 F. 2d 831, and *United States* v. *Foster*, 9 F. R. D. 367, 372. Both cases were decided by the Court of Appeals for the Second Circuit. It is respectfully submitted that both cases are in conflict with the holding of this Honorable Court in

the *Adams* case since, in both cases, the Court of Appeals created exceptions to the *Adams* rule. However, even if these decisions were justifiable, their reasoning clearly does not apply to the facts of the instant case.

In the *Mitchell* case, the defendant had requested the right to represent himself during the course of his trial and the Trial Court's refusal to permit the defendant to defend himself was sustained upon the ground that this request had not been made at the beginning of the trial and had not been made in good faith, but for the purpose of obtaining a mistrial or of delaying the trial. However, the motion in the instant case, as has been shown above, was made at the very commencement of the trial and valid reasons were given at that time for the request. The application was obviously made in good faith and not for the purpose of delay, since no request for an adjournment was coupled with this motion, and it would be hard to imagine a situation where the reasons underlying such request could be more cogent or compelling.

It should be noted, moreover, that in denying the defendant's application in the *Mitchell* case, the Court, nevertheless, recognized the rule of the *Adams* case at pages 1010 and 1011, as follows:

> "• • • The cases cited by defendant stress equally, as, indeed, they properly should, the right of an accused to act for himself, and his right to have a lawyer assigned in his behalf. See, among others, Johnson v. Zerbst, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461; Powell v. State of Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A. L. R. 527; Adams v. United States ex rel. McCann, 317 U. S. 269, 279, 63 S. Ct. 236, 87 L. Ed. —; Betts v. Brady, 316 U. S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595; People v. Price, 262 N. Y. 410, 413, 187 N. E. 298; and cf. 42 Col. L. Rev. 271, 1205; 31 Geo. L. J. 327.
>
> • • •

> Presumably if an accused during the trial decides that he wishes to proceed alone and without delaying the trial, and makes his decision with full knowledge of the risks he is taking ('with eyes open,' Adams v. United States ex rel. McCann, supra), that course should be open to him, in view of the fact that he must have complete confidence in his counsel, In re Mandell, 2 Cir., 69 F. 2d 830; People v. Thompson, 205 App. Div. 581, 199 N. Y. S. 868."

In the *Foster* case, the request made by one of the defendants to discharge his counsel and to sum up on his own behalf was made at the conclusion of the trial. Even under these circumstances, Judge Medina indicated that he would have granted the relief requested by the defendant as a matter of discretion if he felt that the application had been made in good faith, stating as follows, at page 342:

> "Were I convinced that these applications are based upon a genuine belief on the part of Mr. Davis that he could on his own behalf make a better summation on the evidence in the record, and by lawful and proper arguments, than could Mr. Sacher, I should without hesitation, permit him to sum up."

However, Judge Medina found that the application was merely another manoeuver by the defense intended to result in disruptive or disorderly incidents, and therefore, denied the application.

For obvious reasons, none of the arguments advanced by Judge Medina in his decision are applicable to the individual petitioner's request to represent himself in the instant proceeding, and it has not even been suggested that the individual petitioner made this application in bad faith.

The Court below cites the *Mitchell* case, cited *supra*, for the proposition that the constitutional right to the assistance of counsel and the correlative right to dispense

with a lawyer's help cannot be both exercised at the same time. Conceding this truism, it is obvious that it has no application to the instant case. The Court below erroneously supported its conclusion that "Mr. Carey in effect wished to be represented by the attorney for the corporation * * * and also act as his own attorney" by stating that the individual defendant was "content" to have Mr. Driscoll continue as attorney for Private Brands. However, the Court below entirely overlooked the fact that it was not the individual defendant's contentment which dictated Mr. Driscoll's continuance as the attorney for the corporation, but a recognized rule of law.

Upon the basis of Section 1654 of Title 28, U. S. C. and the common law rule to the same effect, the Courts have constantly held that a corporation may appear in Court only through an attorney at law.

> *Brandstein, et al.* v. *White Lamps, Inc., et al.*, 20 Fed. Sup. 369, 370;
> *Schifrin* v. *Chenille Mfg. Co. Inc., et al.*, 34 Fed. Sup. 400, 401.

Since the individual petitioner was prohibited from representing the corporation by virtue of this rule, he could not discharge Mr. Driscoll as the attorney for Private Brands without retaining new counsel for said corporation. In other words, according to the reasoning of the Court below, at the time of making the motion to represent himself, the individual petitioner was placed in this unfortunate dilemma: either he had to accept as his individual counsel an attorney in whose ability he had lost confidence, or he had to request an adjournment to seek new counsel for the corporation, thereby giving the Trial Court valid grounds for the refusal of his motion because it would necessitate undue delay of the trial.

In this connection, it is interesting to note that the Court below gave as one of its principal reasons for sustaining

the denial of the defendant's application to represent himself in the *Mitchell* and *Foster* cases, cited *supra*, the fact that the granting of such application would have occasioned undue delay.

In the instant case, the Court below refers to "delay and confusion in the trial" which might have resulted from the granting of the individual petitioner's application, as a ground for sustaining the lower Court's decision. Thus, it appears that the Court below failed to distinguish between delay occasioned in bad faith and the delay which must almost inevitably result where a defendant, not a lawyer, represents himself at a trial. If the *Adams* rule has any meaning whatsoever, its benefits cannot be denied a defendant because his self representation may slow the pace of the trial.

The rule enunciated by this Honorable Court in the *Adams* case has been followed by the State Courts and particularly by the Appellate Division of the Supreme Court of the State of New York, Second Department, in *People* v. *Thompson*, 205 App. Div. 581, 199 N. Y. S. 868. In said case, the Trial Court had assigned counsel who had been retained by the defendant but who desired to withdraw as such counsel. Upon appeal from said order of assignment, the Appellate Division, Second Department, reversed the said order upon the law and the facts and the Court held that an assignment of counsel against the defendant's wish is ill advised.

It appears from all of the foregoing not only that the decision of the Court of Appeals is in conflict with the ruling of this Court in the *Adams* case, but that the Court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

As to Question 3:

In finding that there was substantial evidence to support the jury's verdict, the Court below recited the facts allegedly proven by the Government upon which it relied in arriving at its decision. However, after concluding that the testimony to which it adverted in its opinion was amply sufficient to support the jury's verdict, the Court below made a significant concession in footnote 2. This footnote appears after a statement by the Court below in which it admits that the Government's own proof showed that the samples taken at random from both lots of chloroform in question, when tested prior to delivery, were found to be acceptable. In the footnote, the Court below observes that the Government infers that these samples must have been tampered with by petitioners before being sent to the Government laboratory for testing, and adds significantly, "although how that could have been done without breaking the seal placed over the bottle cap by the inspector who selected the samples, is left to conjecture."

It is fair to state that the Government's entire case depended upon proof that the samples above referred to which were submitted to the Government laboratory for testing were not representative of the two lots of chloroform which were delivered by petitioners to the Government upon acceptance of these samples. In the absence of such proof, the Government failed to make out a case, and such proof could not be supplied in the form of "conjecture" alone.

For this reason, it is submitted that in this respect too, the Court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

A careful analysis of the evidence adduced on behalf of the Government, shows clearly that the Government utterly failed to prove any of the elements necessary to sustain a charge of fraud against either of the petitioners.

In order to prove petitioners guilty of a violation of Section 1001 the Government had to establish the following facts beyond a reasonable doubt as the *sine qua non* of the crimes charged:

1. That *at the time of delivery* of the chloroform to the Government by Private Brands, under Lots Nos. 2081 and 2105, said chloroform failed to comply with U. S. P. standards.

2. That petitioners knew that the chloroform delivered to the Government failed to comply with U. S. P. standards at the time that they submitted bills for said chloroform to the Government.

3. That petitioners knowingly and wilfully made false and fraudulent entries and statements in the bills submitted to the Government.

4. That petitioners knowingly and wilfully concealed a material fact from the Government by means of a trick or device.

The evidence adduced by the Government not only failed to establish proof of even one of these necessary elements of the crimes charged against petitioners, but, on the contrary, showed that all of the facts and circumstances surrounding the delivery of this chloroform to the Government point to the petitioners' complete innocence of any crime. This is the inescapable conclusion which derives from the following analysis of the Government's case:

(a) It was proved that the five samples of Lot No. 2081 and the five samples of Lot No. 2105, which were tested by the Agency, were selected *at random* by the government inspector, Ronald Filera (App. 101a, 105a, 108a), which fact was conceded by the Court below, as shown above.

(b) It was proved that all of these samples passed the Government laboratory tests on two separate occasions

and were found to be in accordance with U. S. P. specifications (App. 138a, 139a).

(c) It was shown that petitioners were authorized to make shipment to the Government based upon these favorable reports (App. 67a).

(d) No proof whatsoever was introduced at the trial that the chloroform shipped by Private Brands, pursuant to contract No. 36603, deviated in any respect from U. S. P. standards *at the time of its delivery.*

(e) Since the Government introduced proof of two separate laboratory reports of tests of samples of Lots No. 2081 and No. 2105, which reports were dated March 29th and May 17th, 1952, showing conformity with U. S. P. specifications, a strong presumption was raised that this chloroform was not defective at the time of delivery. Therefore, in the absence of any proof whatsoever of any irregularity or inaccuracy in connection with these tests the results of these tests became conclusive upon the Government.

(f) Although the deviation which allegedly brought these lots of chloroform to the attention of government employees was perfectly visible to the naked eye, viz., floating particles in the chloroform solution, the testimony shows that this deviation was not discovered for more than four months after the first shipments had been made (App. 140a).

(g) No proof was offered by the Government to show that the alleged deviations from U. S. P. specifications, discovered four months and longer after delivery, were not caused by the effects of temperature, handling, lapse of time, or other natural causes or by interaction between the chloroform and the Gutmann cap and Filmaco innerseal. Said cap and innerseal were necessitated by the specification in contract No. 36603 of the type of sealable enclosures to be used by the petitioners (App. 75a). In

view of the lapse of time between delivery and testing, it was incumbent upon the Government to introduce such proof in order to show the materiality of these later tests.

(h) Although the United States Attorney stated, in his summation, that the five samples selected by Mr. Filera on March 24th were five bottles of U. S. P. chloroform purchased from McKesson & Robbins the record is barren of any proof that petitioners in any way influenced the selection of samples at random by the government inspector during his various inspections or tampered with the samples after they had been sealed by the government inspector. Since the Government was found by its own witness' testimony, it was also bound by the inevitable conclusion that follows from this testimony, to wit. that these samples represented a fair cross-section of lots No. 2081 and No. 2105.

This Honorable Court's attention is respectfully called to the fact that the Armed Services Board of Contract Appeals rendered a decision involving the very same issues that were raised in the instant trial in connection with the Government's attempt to recover civilly under a similar contract between Private Brands and the Government for U. S. P. quality chloroform. It is important to note that the Armed Services Board of Contract Appeals determined these issues squarely in favor of Private Brands, but what is even more important is the reasoning by which they arrived at this decision, which has been printed as an addendum to Appellants' Appendix submitted in the Court below, and appears at pages 343a to 347a thereof. In said decision, the Board of Contract Appeals stated, in part, as follows:

> "It appears that the chloroform, when delivered, was tested by experienced chemists for the Government and approved. Obviously, then, such defects as were found developed after delivery, unless it can be shown that the inspections at delivery were in error. Appellant has a right to point to these Gov-

> ernment tests and their conclusions as support for its contention that '*at the time of delivery*' the chloroform was not defective. Quite naturally the conclusions from those inspections place the burden of establishing that they were erroneous upon the shoulders of the Government. This burden, we believe, the Government has failed to uphold." (App. 344a, 345a).

Instead of assuming this burden in the instant case, the Government attempted to prove defendants' guilt entirely by inference and innuendo. Thus, testimony was introduced which, while greatly prejudicial to petitioners, had no actual probative value in the absence of some proof that the samples submitted to the Government had not been selected entirely at random, or that petitioners had tampered with the green adhesive seals applied to those samples.

The Government thus succeeded in giving a sinister connotation to the overlabeling of the bottles in lot No. 2049, which lot had been rejected on February 29, 1952, with labels bearing lot No. 2081. It had been shown that one of the reasons for rejection was a technical mislabeling which necessitated a new label (App. 59a, 61a), and one of the Government's key witnesses, Max Feinberg, admitted that this overlabeling was obvious (App. 156a), yet the Government contended that this was a ruse on petitioners' part to deceive the Government. If petitioners were attempting to dupe the Government into accepting a lot which had been once rejected, the most elementary precaution would have been the removal of the original labels.

Similarly, the testimony of the Government witnesses, Ehrlich and Carpanelli, while gravely damaging to petitioners in the eyes of the jury, furnished none of the missing proof and was immaterial to the principal issues in this case. In this connection, it must be borne in mind that none of the testimony of the Government witnesses who participated in the investigation of petitioners in 1953,

furnished proof of the defective quality of the chloroform delivered to the Government or of any irregularity in the samples selected for testing.

The Court below relies upon testimony of this nature to sustain the jury's verdict, and the jury apparently was influenced by such testimony in arriving at its decision. Yet, viewing the instant case upon its merits and in accordance with the criteria established by the Armed Services Board of Appeals, it is apparent that the Government utterly failed to make out a case against petitioner. In the words of the Armed Services Board of Contract Appeals the petitioners had a right to rely upon the Government tests and their conclusions in support of their contention that at the time of the delivery of the chloroform it was free of defects, and the Government has failed to introduce one iota of evidence to sustain its contention that the chloroform was defective at the time of delivery and, further, that petitioners knew of such defects, if they existed. Therefore, the petitioners' motion to dismiss the indictment at the close of the Government's case should have been granted and, in any event, the Court should have directed a verdict of acquittal at the conclusion of the entire case.

As to Question 4:

The prosecuting attorney, in his summation, attempted to supply the proof which had been missing at the trial by the following statement:

> "Now, I don't know how Mr. Carey got to the Agency the five new samples which bore Lot 2081, but I do know where it came from. I know that it was U. S. P. chloroform and I know that it came from McKesson & Robbins. If you will look at the exhibits in this case you will find that on March 19, 1952, exactly five days before the second group of samples were sent in to the laboratory, Mr. Carey obtained 3,000 pounds of U. S. P. chloroform from

> McKesson & Robbins. That is the source of the chloroform which he submitted as the second group of samples." (P. 34 of Summations)

This paragraph is replete with improper assertions of personal knowledge on the part of the prosecuting attorney unsupported by any evidence whatsoever appearing in the record. There is not one scintilla of evidence to show that Mr. Carey "got" any samples to the Agency or "submitted" any samples, nor that the samples submitted were anything other than samples selected at random by the government inspector, Ronald Filera, from the shipment on the floor of Private Brands' plant, and sealed with Mr. Filera's green government seal.

The Supreme Court, in the case of *Berger* v. *United States*, 295 U. S. 78, 55 Sup. Ct. 629, set forth the following standards of conduct on the part of a United States attorney, at page 633:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interests, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

In the instant case the prosecuting attorney struck an extremely telling foul blow by making assertions at the close of the trial, as of his own personal knowledge, which would appear to the jury to have supplied the evidence

necessary for conviction which had been missing throughout the trial. This statement by the prosecuting attorney was not phrased as a summation of the evidence which he had presented, nor even as the necessary inference to be drawn from this evidence. Rather, it was phrased as a confidential communication to the jury of facts peculiarly within the knowledge of the prosecuting attorney.

In the *Berger* case, cited *supra*, the Supreme Court, at page 633, stated as follows:

> "• • • Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."

How much more telling effect do such assertions of personal knowledge have in a case where the items of "evidence" supplied in this manner, during the prosecuting attorney's summation, are the crucial items of evidence omitted during the trial of the case. The emphatic and unequivocal manner in which Mr. Packard made these statements must have had a profound effect upon the jurors' minds.

The Court below relies on *Henderson* v. *United States*, 218 Fed. (2d) 14, cert. denied 349 U. S. 920 and *United States* v. *Klein*, 187 Fed. (2d) 873, cert. denied 341 U. S. 952. Petitioners do not quarrel with the standard of conduct set forth in the *Henderson* case. However, it is submitted that neither in context, nor out of context, were the prosecuting attorney's comments in his summation understood by any one to be a conclusion drawn from the evidence. It has been shown that there was no basis in the evidence for these comments, nor did the prosecuting attorney make any effort to give some explanation of the means of knowledge upon which he based this statement as did the prosecuting attorney in the *Klein* case. There the Court found that the prosecuting attorney, after using the

words "I know" had qualified his statement by relating it to something in the evidence. Thus, the Court stated, at 877:

> "In most instances when the expression 'I know' was used, some explanation of the means of knowledge was generally added. For example, when it was said: 'I know you can drive from Chicago from 12 o'clock noon to four o'clock in the afternoon,' it was added immediately 'because we had a man on the stand who did it.'
>
> And again, when he said: 'I know Estelle Klein is a liar' he added: 'because other people whose veracity can't be doubted have told us from the witness stand that Eddie Klein wasn't in Chicago watching a television set that night but was down here with a gun in his hand, etc.'"

It has been amply shown that the statements made by the prosecuting attorney in the instant case were made for the purpose of filling a void in the Government's proof and took the place of evidence which was clearly lacking in the Government's case.

The Government has not attempted to show that there was anything whatsoever in the record to justify Mr. Packard's assertions in his summation, but tries to minimize the prejudicial effect of these assertions by characterizing them as a review of the evidence. It is obvious that these remarks do not fall in that category and that they must have played a very important part in the jury's verdict, thereby constituting reversible error.

As to Question 5:

The Trial Court's charge, in effect, was a summation of the Government's case with special emphasis on the testimony of one Government witness, Mr. Hendrixson, a substantial portion of whose testimony was presented to the jury verbatim. Nowhere in its charge did the Court make even passing mention of the evidence presented by peti-

tioners, nor of the theory of the defense. By this omission to the jury, the impression that it deemed all of the evidence submitted on behalf of the defense as having no weight whatsoever and as not being worthy of their consideration.

There can be no question that this charge, which was improper both in form and substance, must have greatly influenced the jury in arriving at its ultimate decision. Nor can there be any question that in arriving at this decision the jury was in no way guided by the Court in establishing the existence of the necessary components of the crime of which they found petitioners guilty.

Although counsel for petitioners took no exception whatsoever to the charge as made to the jury, the law is well settled to the effect that a defendant may take advantage of errors in a charge which were seriously prejudicial to him, even though no exception was taken. To that effect see:

Barron on Federal Practice and Procedure, Vol. 4, p. 251;
Brasfield v. *United States*, 272 U. S. 448, 47 Sup. Ct. 135;
United States v. *Levy*, 153 Fed. (2d) 995;
United States v. *Balodimas*, 177 Fed. (2d) 485;
United States v. *Raub*, 177 Fed. (2d) 312;
United States v. *Buchwick Mills*, 165 Fed. (2d) 198, 201;
United States v. *Perplies*, 165 Fed. (2d) 874;
Madsen v. *United States*, 165 Fed. (2d) 507.

In the last case the Court properly held that Rule 30 of the Rules of Criminal Procedure, requiring the taking of an exception as a prerequisite to any assignment of error in connection with the charge to the jury, does not deprive the Court of the inherent power, of its own volition, to inquire into the adequacy of the charge.

As Barron in his treatise properly states, Rule 30 of the Rules of Federal Criminal Procedure must be read together with Rule 52(b), which allows plain errors or defects affecting substantial rights to be noticed although they were not brought to the attention of the Trial Court.

The law is well settled to the effect that the Trial Court, in a criminal case, has the duty of charging the jury on all essential questions of law, regardless of whether requests for such charge have been made or not.

In *United States* v. *Levy*, cited *supra*, the Court reversed the conviction upon the ground that the Court failed to instruct the jury on the elements of the offense, stating, at page 998, as follows:

> "Both parties agree that in a criminal case it is a court's duty to charge a jury on all essential questions of law, whether requested or not. Miller v. United States, 10 Cir., 1941, 120 F. 2d 968, 972; Kinard v. United States, 1938, 68 App. D. C. 250, 96 F. 2d 522, 524. A trial court's judgment, of course, will rarely be reversed for failure to give instructions, in the absence of a seasonable request or exception. See detailed discussion in Stassi v. United States, 8 Cir., 1931, 50 F. 2d 526. However, even though no request is made, a reversal is justified if the failure to instruct constitutes a basic and highly prejudicial error. Williams v. United States, 1942, 76 U. S. Pp. D. C. 299, 131 F. 2d 21."

To the same effect see:

Morris v. *United States*, 156 Fed. (2d) 525;
Schino v. *United States*, 209 Fed. (2d) 67, cert. denied 347 U. S. 937, 74 S. Ct. 627.

The Trial Court in the instant case failed to charge the jury that a false representation does not amount to fraud unless it be made with a fraudulent intent, and that the Government was compelled to prove, beyond a reasonable

doubt, petitioners' knowledge of any defects in the chloroform at the time of delivery.

Christensen v. *United States*, 90 Fed. (2d) 152;
United States v. *J. Greenbaum & Sons*, 123 Fed. (2d) 770;
Yusen v. *United States*, 8 Fed. (2d) 6;
Cooper v. *Schlesinger*, 111 U. S. 148;
Strang v. *Bradner*, 114 U. S. 555.

Although the Trial Court read the applicable statute to the jury, it entirely failed to define the elements of the offense contained in Section 1001, Title 18, U. S. C. The charge is barren of any definition of the words "knowingly and wilfully"—a most essential element of the offense under Section 1001, Title 18, U. S. C. The charge is also barren of any explanation to the jury with respect to the meaning of the terms "false, fictitious or fraudulent statements," or falsification by "trick, scheme or device", etc., etc., as referred to in said section.

Further, although the Trial Court charged the jury in connection with the burden of the Government to prove guilt beyond a reasonable doubt, the Court erred in failing to include in its charge to the jury the fundamental rule of law that a defendant is presumed to be innocent until proven guilty beyond a reasonable doubt. By failure to charge the jury in connection with such presumption one of the most substantial rights of petitioners was violated.

Coffin v. *United States*, 156 U. S. 432.

Thus, by failing to break the alleged crimes down into their necessary components so that the jury would understand the exact nature of the criminal charges against petitioners and by summarizing the welter of highly technical and highly conflicting evidence in such unorthodox fashion, the Trial Court greatly oversimplified the questions which

should have been submitted to the jury for their consideration. Instead, the Trial Court's charge conveyed the overall impression that if the jury believed the testimony of Mr. Hendrixson, it must find a verdict of guilty, whereas such testimony does not point to petitioners' guilt in any respect. Actually, the Court's charge to the jury was more appropriate to a civil case based upon a failure to deliver in accordance with the specifications of a contract than to a criminal case based upon fraudulent representations or upon a fraudulent concealment, and was so inadequate in all respects as to gravely prejudice petitioners.

CONCLUSION

It is respectfully submitted that the various questions raised in this petition are of such importance in the administration of criminal law that there should be an authoritative determination of the same by this Honorable Court. Accordingly, petitioners ask that this Court issue a writ to review the judgment of affirmance herein.

Respectfully submitted,

ARCHIBALD PALMER,
Attorney for Petitioners.

APPENDIX

Opinion of the Court Below

PALMER, MASIA AND PALMER, Attorneys for Appellants.

CORNELIUS W. WICKERSHAM, JR., United States Attorney for Appellee, MARIE L. MCCANN, Assistant U. S. Attorney, of Counsel.

SWAN, *Circuit Judge*:

The appellants were convicted on each count of a twenty-one count indictment charging violations of 18 U. S. C. A. § 1001.[1] In substance the charge was that they falsely and fraudulently represented to an agency of the United States that bottles of chloroform purchased by the government from Private Brands, Inc., of which Carey was President and controlling stockholder, conformed to the standards of the United States Pharmacopoeia, referred to as "USP," when in fact they did not, as defendants well knew. In sixteen of the counts the false representation was made by submitting to Armed Services Medical Procurement Agency a bill for payment to Private Brands which contained a certificate signed by the corporation's president that "the above bill is correct and just." In counts six to ten inclusive the appellants were charged with concealing by trick

[1] § 1001. *Statements or entries generally*

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willingly falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

or device a material fact, namely, that chloroform shipped and billed to the Agency had been previously rejected for non-conformity to the USP specifications, and that this fact was concealed by submitting bills which identified the shipments under a different lot number than that which had been rejected.

The appellants' first point is that the court should have directed a verdict of acquittal for insufficiency of evidence. There is no merit in this point. There is substantial evidence to support the jury's verdict.

Private Brands, Inc., was in the contract packaging business, that is, it did not manufacture the products it sold but packaged products obtained from others. The prosecution proved from the defendants' own records that the chloroform they had, except for a very small amount purchased from McKesson & Robbins, and hence the only chloroform which they could possibly have used to fill Private Brands' contract with the Agency had been purchased from Du Pont. It was proved that Du Pont chloroform was "Technical" chloroform and did not comply with the specifications for USP chloroform as the defendants knew, and that they purchased it from Du Pont as "Technical" chloroform at a substantially lower price than they would have had to pay for USP chloroform. With respect to counts six to ten inclusive, there was evidence that after rejection by the government of samples taken from the Du Pont chloroform numbered by the defendants lot 2049, they relabelled it as lot 2081 and resubmitted the same chloroform without change; and that when, after delivery, the defendants were again advised that the shipments did not comply with USP requirements and an F.B.I. agent was sent to investigate, Carey told the agent that he, with the assistance of two other men, had reworked the chloroform with activated carbon before it was relabelled as lot 2081. But the men he named as his assistants, although instructed by him to testify that the chloroform had been reworked, denied without contradiction at the trial that

they had assisted him or had any knowledge that the chloroform had been reworked. Carey himself did not take the stand. The testimony above related is amply sufficient to support the jury's verdict.

It is true that the government's own proof showed that samples taken at random from both lot 2081 and another lot numbered 2105, when tested prior to delivery, were found to be acceptable.[2] The appellants make much of this and contend that the chloroform conformed with USP requirements when delivered and that the deviations disclosed by later tests long after delivery may have occurred as a result of chemical reaction between the contents of the bottle and the inner adhesive seal of the Gutman cap with which the bottle was closed. However, it was for the jury to appraise the force of these contentions and we cannot say that the jury acted unreasonably in relying on the undisputed facts that the defendants' only source of supply was the Du Pont "Technical" chloroform and that the evidence of an attempted collusive cover-up, as to which the F.B.I. agent testified, was corroborated by two of the defendants' employees.

The second, and most substantial, of the appellants' contentions is that Judge Galston erred in not permitting Mr. Carey, who is not a lawyer, to act as his own attorney. His request to do so was made at the opening of the day set for trial but before a jury had been empanelled. Mr. Driscoll, a competent lawyer, selected by Mr. Carey to represent him and his corporation, whose interests were conceded to be identical, had been attorney for both defendants for some seven weeks. At no time prior to the date set for trial, although the case had been twice called for trial and ad-

---

[2] These samples were left at the corporation's office to be sent to the government laboratory for testing, and the government infers that they must have been tampered with before being sent, although how that could have been done without breaking the seal placed over the bottle cap by the inspector who selected the samples, is left to conjecture.

journed at the defendants' request, had Mr. Carey expressed any dissatisfaction with having Mr. Driscoll represent both defendants. His explanation of why the motion was made on the day set for trial was that he had not had time to indoctrinate Mr. Driscoll on the chemistry of chloroform and thought that he himself was better qualified to cross-examine expert witnesses whom the government would call. He was content to have Mr. Driscoll continue as attorney for Private Brands but wanted to represent himself or at least to be appointed as co-counsel so that he might cross-examine. Judge Galston denied the motion, stating that he regarded Mr. Driscoll as a very competent attorney, that he would permit Mr. Carey to sit at the counsel table for consultation, and that if a time came when he thought Mr. Carey should cross-examine, he would permit it. However, during the trial Mr. Carey was not permitted to take up the cross-examination of any witness.

It is well settled as a general principle that an accused has the constitutional right to the assistance of counsel and the correlative right to dispense with a lawyer's help. *Adams* v. *United States*, 317 U. S. 269, 279. But as this court said in *United States* v. *Mitchell*, 2 Cir. 137 F. 2d. 1006, 1010: "Obviously, however, these rights cannot be both exercised at the same time." And an accused's right to represent himself is not so absolute that it must be recognized when to do so would disrupt the court's business. *United States* v. *Mitchell*, 2 Cir. 138 F. 2d. 831, cert. den. 321 U. S. 794; *United States* v. *Foster*, S. D. N. Y. 9 F. R. D. 367, 372; see also *Overholser* v. *De Marcos*, App. D. C. 149 F. 2d. 23, 26, cert. den. 325 U. S. 889. In the case at bar Mr. Carey in effect wished to be represented by the attorney for the corporation, whose interests were identical with his own, and also act as his own attorney. The trial judge may well have thought this would cause delay and confusion in the trial. We cannot see any abuse of discretion in the way he handled the matter, nor any prejudice resulting to the defendants.

The remaining contentins of the appellants require little discussion. In point three it is urged that the indictment is multiplicitous because each false statement is alieged as a separate count. They contend that only one crime was committed since all the false statements related to deliveries made under a single contract. The cases relied upon, *Ex Parte Snow*, 120 U. S. 274 and *United States* v. *Universal C.I.T. Credit Corporation*, 344 U. S. 218, are readily distinguishable. The applicable rule is stated in *Doherty* v. *United States*, 10 Cir. 193 F. 2d 487, 488; *Berg* v. *United States*, 9 Cir. 176 F. 2d. 122, 125, cert. den. 338 U. S. 876; *United States* v. *Marzani*, D. C. D. C., 71 F. Supp. 615, 618, aff'd, *Marzani* v. *United States*, 168 F. 2d 133, aff'd, 335 U. S. 895, rehearing granted and decision adhered to, 336 U. S. 922. Furthermore, any objection as to multiplicity of the indictment was waived by not raising it before trial, *Anderson* v. *United States*, 6 Cir. 189 F. 2d. 202, 204. Since the appellants could have been fined $10,000 on any one count and Carey could have been given a prison sentence under 18 U. S. C. A. § 1001, it is obvious that they have not been prejudiced by the sentences imposed.

We find no reversible error in the rulings on evidence, the exclusion of which is complained of in appellants' point four. The necessary foundation to make it admissible was not laid.

The complaint about the prosecutor's summation is much ado about nothing. From the context it is clear that his statement that "I know" that the samples which bore lot number 2081 came from the McKesson & Robbins chloroform was a conclusion drawn from the particular evidence to which he referred, and could not have led the jury to believe that his statement was based on evidence known to the prosecutor but not introduced. *Henderson* v. *United States*, 6 Cir. 218 F. 2d. 14, 19, cert. den. 349 U. S. 920, and *United States* v. *Klein*, 7 Cir. 187 F. 2d. 873, 876, cert. den. 341 U. S. 952 are applicable, not *Berger* v. *United States*, 295 U. S. 78.

The alleged errors in the charge of the court are not sustainable. The failure to define "wilfulness" or charge as to the presumption of innocence was not error in the absence of requests to do so. See *United States* v. *Capitol Meats*, 2 Cir. 166 F. 2d 537, 538, cert. den. 334 U. S. 812; *United States* v. *McGuire*, 2 Cir. 64 F. 2d. 485, 493. The failure of a defendant to request charges omitted or to take exception to the charge as given normally precludes any claim of error,[3] although an appellate court may reverse for errors not called to the attention of the trial judge if they are such as affect substantial rights.[4] We see no errors of this character and the charge as given was correct and adequate.

Judgment affirmed.

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[3] Rule 30 F. R. Cr. P.; *United States* v. *Campisi*, 2 Cir. 248 F. 2d 102, 107.

[4] Rule 52(b) F. R. Cr. P.

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IN THE

Supreme Court of the United States

October Term, 1957

No. 727

PRIVATE BRANDS, INC. and FRANCIS P. CAREY,

Petitioners,

v.

UNITED STATES OF AMERICA.

PETITIONERS' REPLY BRIEF

ARCHIBALD PALMER,
Attorney for Petitioners.

IN THE

Supreme Court of the United States

October Term, 1957

No. 727

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UNITED STATES OF AMERICA.

PETITIONERS' REPLY BRIEF

When the facts and circumstances, through the admission by trial counsel that he was not familiar with the technical matters which were the gravamen of the entire case and the statement by the individual defendant with regard to said matters, made it apparent at the opening of the trial that the interests of justice required the defendant's active participation in the trial *pro se*, the Trial Court committed serious error in denying the defendant the right to represent himself.

At the commencement of the trial the following ensued, prior to the selection of the jury:

> "Mr. Driscoll: If the Court please, at this time I wish to withdraw as attorney for the individual defendant Francis P. Carey, who requests that he be permitted to defend himself personally.
>
> The Court: Is he a lawyer?
>
> Mr. Driscoll: He is not, your Honor; and I will remain as attorney for the corporation.
>
> The Court: That is a very unusual request. Why is it made?

Mr. Carey: I will explain that, sir. This indictment was returned the middle of last month. The allegations are most technical. The first three weeks of the ensuing time was for a legal motion (that was a motion for an examination of the Grand Jury minutes). The Government did not in any way attempt to expedite that, so that we have a case of a competent layman, with insufficient time to devote himself—

• • •

The Court: Well, I don't care. What I want to impress upon you is that you have very able counsel in Mr. Driscoll, who is fully competent to take care of your affairs.

Mr. Carey: I could see that, sir. I also am in the corporation. I have a great stake in a factual sense. It would be very difficult to coach Mr. Driscoll in two or three weeks which we have had to prepare this case in the technical side. Mr. Driscoll will be faced with Government experts on technical considerations. I do not feel that he is—

The Court: Is your interest contrary to the interest of the corporation?

Mr. Carey: No, sir; it is identical.

The Court: Then I will not release Mr. Driscoll from the assignment. He will appear for both.

Mr. Carey: I would then like to be down as co-counsel with Mr. Driscoll so that I can take into consideration the technical side of some of the evidence.

The Court: You can sit at the counsel table.

Mr. Carey: I would like the right of cross examination of certain witnesses on technical subjects.

The Court: I will see. If the situation occurs for that, I may grant you permission to do it.

Mr. Carey: The only thing involved here is the inability to provide Mr. Driscoll with that background.

The Court: I am not persuaded that this is necessary, in the light of the competence and ability of your counsel. However, you can sit at the counsel table and if there comes a time when it is necessary to cross examine, that I think you should be permitted to do so, I will let you cross examine. Now we will draw a jury.

Mr. Carey: Can I offer an objection or note an objection?
The Court: When?
Mr. Carey: Now.
The Court: Yes.
Mr. Carey: Thank you, sir'' (App. 41a, 42a, 43a).

It appears that in connection with the important statements being made by the defendant he was interrupted so that he did not conclude his statements to the Court. The only inference that could be drawn from the questions of the Court was that if counsel was sufficiently qualified to represent the corporation then he could also represent the individual defendant. What the Trial Court overlooked was the fact that the individual defendant and the attorney could have complemented each other if the defendant, who held himself out to the Court to be qualified to deal with the technical matters, were permitted to represent himself and develop all of the facts with respect to such technical matters and the attorney were permitted to deal with the legal aspects of the case. In such way justice would not have been sacrificed to delicacies in procedure.

The refusal of the Trial Court to permit the defendant to represent himself and, on several occasions during the trial, to cross-examine witnesses with respect to highly technical matter adduced by the prosecution, permeated the entire trial and constituted such error as to affect substantial rights of the defendant.

The determination as to the guilt or innocence of a defendant should not depend upon the skill of an attorney or his technical knowledge of the particular subject involved but should depend upon the truth of the charges made in the indictment. If the truth or falsity of those charges can best be determined by permitting a defendant, who is familiar with the subject, to represent himself, then the refusal to permit such action constitutes an arbitrary abuse of discretion on the part of the Trial Judge and actually

deprives the defendant of the right to obtain a fair trial and of his constitutional right of due process of law, as well as the right to defend himself.

At the opening of the argument before the United States Court of Appeals, Mr. Driscoll, trial counsel, but who was not appeal counsel, was permitted to make a statement to the Court of Appeals. In this statement Mr. Driscoll informed the Court that due to his complete unfamiliarity with chemistry and the difficult technical questions involved, he felt that he had been unable to defend Mr. Carey properly.

A conviction obtained under the circumstances in the case at bar is tantamount to a conviction by default, which has no basis in our criminal jurisprudence. The Trial Court did not remedy the situation by permitting the defendant to sit at the counsel table. This was not a special privilege afforded to this particular defendant but is a privilege accorded to defendants in all criminal cases, and is universally recognized. Whether by doing so this defendant could impart to his counsel sufficient technical knowledge to enable counsel to properly examine and cross-examine witnesses is another question.

It is difficult at times for an assistant trial counsel to coach the trial counsel in submitting evidence or cross-examining witnesses. It is even more so for a layman, particularly when he has a defect in speech such as stammering, to be able, in the course of the presentation of the evidence or the cross-examination of witnesses, to impart information or knowledge of technical matters which require explanation to counsel sufficient for such purposes, particularly where the Court must take judicial notice of the fact that the coaching must be done quietly, clandestinely, and under such circumstances as in the case at bar, which would make it impossible for the defendant to be of any use to trial counsel in the defense of the case. The prosecution, in its memorandum in the United States Court of Appeals, refers to the speech difficulty of the defendant.

The Government, in its brief in opposition to the instant petition, states, in its footnote at page 16, as follows:

> "Petitioners point to the fact that the Armed Forces Board of Contract Appeals denied the government's request for a recovery of some of the money paid under this contract in a civil administrative proceeding. Of course, such a determination, based on whatever evidence was before the Board, is not determinative of the sufficiency of the evidence presented at this trial."

The decision of the Armed Service Board of Contract Appeals reads, in part, as follows:

> "The testimony generally is quite clear to the effect that the chloroform is very sensitive to atmospheric and light conditions, as well as substances with which it comes in contact. There seems to be no question about there being defects in the chloroform, discovered in April or thereafter; but the weak link in the chain of proof comes with the attempt to attribute these defects to the condition *at the time of delivery*. The acceptance of the chloroform after tests, at the time of delivery, is a fact upon which appellant may rely as evidence of its then condition; and it then behooves the Government to show that those tests were in error, or that the defects were latent. Proof of the result of the later tests is not sufficient, as the expert testimony is to the effect that the defective condition could have developed after delivery. In other words, a defective condition in April or later is not inconsistent with an acceptable condition at time of delivery" (App. 346a).

The decision of the Armed Service Board of Contract Appeals shows that when the evidence was competently presented they arrived at a decision directly contrary to that in the criminal proceeding. This is noteworthy because in this civil proceeding the Government only had the burden of establishing its case by a fair preponderance of the evidence whereas in the criminal proceeding the

Government was required to prove its case beyond a reasonable doubt. If the Government was unable to establish misrepresentation by the defendants in connection with the sale of their products by a fair preponderance of the evidence before the Armed Service Board of Contract Appeals, what is their explanation for having obtained a conviction based upon substantially similar evidence where they were required to establish the alleged false and fraudulent representations beyond a reasonable doubt?

The Government, in its brief in opposition to the instant petition, concedes that it has no direct evidence that the defendants tampered with the samples selected by the Government Inspector and sealed by him. However, it attempted to offer indirect proof of the quality of the chloroform at the time of delivery by reference to tests of a sample which had remained on the shelf for more than a year after delivery. This argument completely ignored the defendants' contention that the deviations, if any, appearing in the chloroform submitted for testing by the various government depots long after delivery were caused principally by extremes of temperature in excess of the maximum prescribed by the U. S. P. and by handling, which enabled the contents of the bottles to interact with the Gutmann cap and Filmaco innerseal, none of which factors affected the sample remaining on the shelf in the government laboratory.

It seems intolerable that the Government should persist in demanding that the verdict of guilty stand when it was unsuccessful, in a civil proceeding, in establishing the same charges by a preponderance of the evidence.

Respectfully submitted,

ARCHIBALD PALMER,
Attorney for Petitioners.

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No. 727

In the Supreme Court of the United States

OCTOBER TERM, 1957

PRIVATE BRANDS, INC., AND FRANCIS P. CAREY,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 352–358) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 19, 1957 (R. 359). The petition for a writ of certiorari was filed on January 16, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioner Carey should have been allowed to conduct his own defense and personally examine witnesses, where the corporate defendant of

which Carey was president and controlling stockholder was represented by an attorney, the interests of the individual and corporate defendants were identical, and Carey was permitted to sit at counsel table and formulate the questions to be asked by counsel.

2. Whether the evidence was sufficient.

3. Whether the prosecutor's summation was improper.

4. Whether the trial judge's instructions were sufficient.

STATEMENT

A twenty-one count indictment filed in the United States District Court for the Eastern District of New York charged petitioners with falsely and fraudulently representing to the Armed Forces Medical Procurement Agency that bottles of chloroform supplied to the Agency under contract by petitioner Private Brands, Inc.,[1] of which petitioner Carey was President, conformed to the standards of the United States Pharmacopeia (R. 6–21). Counts 1 through 5 and 11 through 21 relate to false representations contained in bills submitted to the Agency by Private Brands for payment, which stated, in effect, that the bill was correct and just. In counts 6 through 10 petitioners were charged with supplying and seeking payment for chloroform which had previously been rejected by the Agency as below the contract standard, meanwhile concealing the fact of previous rejection. After trial before a jury petitioners were found guilty as charged (R. 332–335). Private Brands was sentenced

[1] Hereinafter referred to as "Private Brands."

to a fine of $100 under each count. Petitioner Carey was fined $100 on each count, the imposition of jail sentence was suspended, and he was placed on probation for one year (R. 37–40, 337). On appeal, the convictions were affirmed.

1. During 1952 and at all times since, Carey has been a very substantial—and at the time of trial, the controlling—stockholder in Private Brands (R. 110–111). The corporation is in the contract packaging business, *i. e.*, it does not manufacture any product and does not usually sell any product under its own name. It packages a variety of products, including but not limited to drugs and chemicals (R. 232).

In December, 1951, Private Brands contracted, after competitive bidding, to supply 25,824 one-pound bottles of chloroform to the Armed Services Medical Procurement Agency (R. 45–47, 50).[2] It was agreed that the chloroform was to conform to the quality standards set forth in the United States Pharmacopeia for chloroform (R. 46, 81).[3] Detailed packing, marking, and shipping instructions were given to petitioners (R. 52–54), and provision made for pre-shipment inspection and testing of the chloroform by the

---

[2] Referred to as the "Agency."

[3] This publication—referred to as "U. S. P."—contains formulas and standards for thousands of chemical compounds used medicinally. No product may bear the title "U. S. P." unless it conforms to the standard set forth. The standards are enforced by the Pure Food and Drug Division of the Department of Health, Education, and Welfare (R. 132–133.)

Agency (R. 56). On February 20, 1952, and March 4, 1952, the Agency exercised its option under the contract to increase the total amount of chloroform to be supplied to about 49,000 bottles (R. 65).

On February 18, 1952, a government inspector obtained five sample bottles of chloroform from Private Brands as representative of those bottled and set aside to be used to fulfill the contract (Lot No. 2049). He sealed them and they were sent to the Agency's laboratory (R. 56–58, 101–105). The laboratory found that the samples did not comply with the essential requirements of the U. S. P. specification as to labeling, description, and specific gravity. Moreover, the samples contained readily carbonizable substances and odorous and chlorinated decomposition products (R. 59, 134–135). These discrepancies were gross deviations from the specification and the samples were rejected (R. 138).

On March 5, 1952, the company was notified that, on the basis of the submitted samples, the chloroform was unfit for the use intended and that its mislabeling could cause confusion in stock records (R. 61). By letter dated March 7, 1952, petitioner Carey, acting for Private Brands, offered to submit new samples (R. 62).

Private Brands then purported to replace the rejected lot (No. 2049) with a new lot (No. 2081). New samples were selected and additional laboratory tests were made. The second laboratory report, dated March 29, 1952, was favorable and petitioners were authorized to make shipments to various medical supply depots throughout the country (R. 67, 107,

138, Govt. Ex. 25). A third lot (No. 2105) also was accepted as conforming to the contract after the testing of samples on May 17, 1952, and its shipment was authorized (R. 108–109, 139).[4]

During April, 1952, Private Brands shipped Lot No. 2081 in 5 separate shipments, some 25,824 bottles of chloroform, to various Army Depots throughout the country. Sometime late in June, 1952, Lot No. 2105 was shipped (11 separate shipments) in the same manner. After each shipment, Private Brands, by petitioner Carey, submitted a bill for payment to the Agency. In each instance Carey certified that the bill was "just and correct" and received payment, a total of some $17,500 (R. 109, 177–178).[5]

On August 19, 1952, the Agency's laboratory received a communication from Fort Totten, New Jersey, stating that particles had been found in the chloroform received from petitioners (Lot No. 2081) (R. 140). Six bottles from the shipment made by Private Brands to Fort Totten through Schenectady General Depot were then obtained for further testing (R. 141). These new tests revealed that there were chemical deviations from U. S. P. standard in the chloroform shipped to Fort Totten by Private Brands, and that these deviations were essentially the same as those found when samples from Lot No. 2049 had been tested. In particular, the specific gravity of the

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[4] As noted *supra*, p. 4, the number of bottles to be supplied by petitioners was increased in late February and early March. Lot No. 2105 was bottled to fulfill this increased commitment.

[5] These sixteen shipments form the basis for counts 1 through 5 and 11 through 21.

chloroform was consistently higher than that allowed for U. S. P. chloroform. Moreover, inspection of the six bottles indicated that each bottle bore two labels, one superimposed on the other. The exposed label bore Lot No. 2081. The hidden label bore Lot No. 2049 (R. 83, 141–142, 156).

Comparatively large samples of Lots No. 2081 and No. 2105 were then obtained from Schenectady General Depot and additional tests made. Once again, gross deviations from U. S. P. standard were found, and the specific gravity was not within the range for U. S. P. chloroform. However, the bottles in Lot No. 2105 had not been overlabeled (R. 83, 143–145).

After the laboratory found that the sample submitted by Fort Totten did not comply with the U. S. P. standard for chloroform, the Agency suspended issuance of the chloroform by the depots and demanded that Private Brands reimburse the government for the 44,000 bottles of chloroform still on hand (R. 189–191). In a letter dated April 1, 1953, and signed by petitioner Carey, the corporation replied to the charge of non-compliance and demand for reimbursement. At that time it was claimed that after Lot No. 2049 had been rejected (March 3, 1952) the chloroform had been filtered, redistilled, rebottled, and new labels superimposed on the old ones (R. 193–194).

On June 25, 1953, petitioner Carey was interviewed by F. B. I. Agents Johnson and Hogan. They informed him that he need not consent to be interviewed and that anything he might say could be used against him. They then asked Carey about the claim that

the chloroform had been redistilled and filtered. Carey stated that he had personally participated in "reworking" the chloroform and that Robert Ehrlich, production manager, and others had helped him (R. 202–204). Furthermore, he stated that he had personally directed the relabeling, which was done under the supervision of Mr. Ehrlich (R. 204, 213). At a later interview on August 4, 1953, Carey claimed that the "reworking" occurred on two weekends in March and that Ehrlich and one Anthony Carpinelli had helped him (R. 206). These claims were corroborated by Ehrlich and Carpinelli (R. 210). On December 28, 1953, however, Carpinelli withdrew his previous statement. At that time he admitted that he had not participated in "reworking" the chloroform and that he had given his earlier false statement at the request of "someone" from Private Brands (R. 211). At the trial he testified, on behalf of the government, that his first statement to the F. B. I. agents was false and that Robert Ehrlich had directed its making (R. 222–224).

Mr. Robert Ehrlich testified that he was production manager for the corporation; that his statement to the F. B. I. agents that he had participated in reprocessing this chloroform was false; and that he had been directed by petitioner Carey to give a false statement (R. 218–220). Carey had also directed the relabeling, which was done on the regular production line (R. 221).

The Agency laboratory normally procured the chemical supplies which it used in the course of its

work from Schenectady General Depot. In the course of normal procurement it had received 10 bottles of chloroform from Lot No. 2081. In addition, 1 bottle from the sample for Lot No. 2081 submitted by Private Brands was still on hand. These 11 bottles were tested October 22, 1953, one year and seven months after Lot No. 2081 was shipped by petitioners. The ten bottles which had been shipped to Schenectady General Depot did not comply with the U. S. P. standard. The one bottle which had been submitted as part of the sample and not used did comply (R. 145–147).

In August 1954, a large sample of bottles from each of the five shipments of Lot No. 2081 was examined at the various depots to which they had been consigned by petitioners. In each instance, 100% of the sample bore two labels. The exposed labels bore Lot No. 2081. The covered labels bore Lot No. 2049 (R. 179–181).*

In 1952, prior to the time when it was awarded the government contract, the corporation had no chloroform on hand. On February 6, 1952, Private Brands received almost 28,000 pounds of technical chloroform from E. I. DuPont Corporation, paying a price of 16.2 cents per pound (R. 115–116, 118). All except 1,900 pounds was used by February 20, 1952 (R. 116). Next, 3,000 pounds of U. S. P. chloroform were received from McKesson & Robbins on March 19, 1952.

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*Counts 6–10 alleged that, by referring to the chloroform as part of Lot No. 2081 in its bill for payment, petitioners concealed the fact that the chloroform was part of a lot (No. 2049) which had previously been rejected.

The purchase price was 30 cents per pound (R. 116, 119). Early in May 1952, another 28,000 pounds of technical chloroform were purchased from DuPont at a price of 16 cents per pound (R. 116, 120). This, too, was expended by the end of the month (R. 116).

The DuPont company produces technical chloroform but has not made U. S. P. chloroform since 1951 (R. 81–82). U. S. P. chloroform is stabilized with ethyl alcohol to prevent decomposition, whereas technical chloroform is stabilized with a lesser percentage of amylene. For this reason, the specific gravity of technical chloroform (that is, its weight per volume) is consistently higher than that of U. S. P. chloroform (R. 82–83).[7] Moreover, the impurities which U. S. P. chloroform may contain are limited, whereas technical chloroform may contain any amount or kind of impurities (R. 153–154). For this reason, only U. S. P. chloroform can be used for medicinal and laboratory test purposes (R. 153–154), and the Agency purchases only U. S. P. chloroform (R. 194), even though the price of U. S. P. chloroform is substantially higher than that of technical chloroform (R. 84).

2. The indictment was filed on December 2, 1954, and the case set for trial on January 24, 1955 (R. 1–2). Several short adjournments were taken at the request of petitioners and the case did not come on

[7] Both ethyl alcohol and amylene are light in weight. As compared to U. S. P. chloroform, technical chloroform contains more chloroform and impurities and less stabilizer. Hence a volume of technical chloroform will weigh more than the same volume of U. S. P. chloroform.

for trial until January 31, 1955 (R. 41, 349–351). On that day, for the first time, petitioner Carey requested permission to defend himself personally, while Mr. Driscoll, his attorney, was to continue as counsel for the corporate petitioner. The request was grounded on the assertion that the case involved technical chemical matters and that Mr. Driscoll had been unable to master the technical side of the cas in the time allowed prior to trial (R. 41–42, 277). The district judge ascertained that the interests of petitioners were identical and denied the request, saying (R. 43):

> I am not persuaded that this is necessary, in the light of the competence and ability of your counsel. However, you can sit at the counsel table and if there comes a time when it is necessary to cross examine, that I think you should be permitted to do so, I will let you cross examine.

During the course of trial Mr. Philip R. Hendrixson, a chemist employed by the DuPont corporation, testified for the government to the fact that DuPont made only technical chloroform during the time of the contract. He also explained the differences between U. S. P. chloroform and technical chloroform (R. 80–85). When the time came for cross-examination, defense counsel stated that petitioner Carey would like to cross-examine. The court denied the request (R. 85) stating:

> No. He can give you whatever questions he wants you to put and you can put the questions.

During the presentation of the evidence for the defense, out of the presence of the jury, defense counsel stated that petitioner individually wished to examine a witness he proposed to call (R. 276–277). The court again pointed out that the attorney had appeared for both defendants at all times before trial, that the court had consistently permitted petitioner to suggest the questions he wished put to the witness, although this practice had protracted the trial. The court said it would still permit counsel "to consult with the individual defendant and have him suggest to you any questions that you feel he wants to have put to the witness". (R. 278).

ARGUMENT

1. Petitioner Carey requested permission to defend himself on the very day of trial, some seven weeks after indictment, and after permitting his counsel to handle the preliminary motions. The trial court denied the request but granted petitioner Carey permission to share the counsel table and agreed to consider the question of cross-examination when it arose. Such action was clearly within the permissible discretion of the trial judge. The interests of the corporate and individual petitioners were identical, and it was manifestly desirable that the attorney, rather than the individual, have the primary responsibility for the conduct of the case. While an accused may waive his constitutional right to counsel (*Adams* v. *McCann*, 317 U. S. 269, 279) the trial judge did not err in refusing to permit defendant to embark on "* * * the well-nigh suicidal course

of attempting to go on with the case alone" unless there was reason to believe that petitioner could have presented his defense better had he acted in person rather than through his counsel. *United States* v. *Mitchell,* 138 F. 2d 831, 832 (C. A. 2), certiorari denied, 321 U. S. 794. There is no support in the record for such an inference, and, of course, the evaluation of the ability of the individual petitioner to ask questions personally rather than through counsel is one which the trial judge, having the parties before him, is in the best position to make. It may well be that the court was of the view that the procedure requested would not only delay the trial but might prejudice the petitioner in the eyes of the jury.

While petitioner was not allowed to cross-examine the witness personally, he was granted the equivalent thereof. He was allowed to formulate the questions which he wished to be put by his attorney. The record shows that counsel cross-examined expert witnesses at some length, attempting to induce them to concede that chloroform might meet the specifications for U. S. P. chloroform even though its specific gravity was slightly higher than the range provided by the U. S. P. specification (R. 87–89, 159–161). Where counsel got into difficulty was when he tried to put questions, which he said were suggested by petitioner, relating not to chloroform but to formaldehydes, which were not involved in the case (R. 90–91).

Of ten defense witnesses, only one, Mr. William Bechtoldt, testified concerning chemical matters (R. 311–313, 316–320). Through him an attempt was made to show the results of chemical tests by Bech-

toldt, an independent chemist, on a bottle of chloroform submitted to him by petitioners (R. 311–312). However, the defense completely failed to show that the bottle of chloroform was similar to that supplied to the government under the contract (R. 315). Beyond that, after consultation with petitioner (R. 316) an attempt was made to put a hypothetical question which was excluded as based on an incorrect characterization of the evidence (R. 316–318), and there was an unsuccessful attempt to show that chloroform might have a higher specific gravity than the range provided by U. S. P. standards and yet be accepted as U. S. P. chloroform (R. 319–320).

The government proceeded on the theory that petitioners had contracted to supply U. S. P. chloroform but, instead, had wilfully and fraudulently supplied technical chloroform—a less expensive substitute which was unsuitable for medical and laboratory purposes. The theory of the defense was that the chloroform had deteriorated while in storage after delivery due to the type of closure used on the bottles of chloroform, without fault or fraud on the part of petitioners. Defense counsel had seven weeks to prepare for trial and the chemistry problems in this case were not so difficult that they could not have been mastered in much less time. Petitioners are not able to point to a single area where petitioner Carey, had he been permitted to conduct his own defense, would have been able to present evidence which was more favorable or more extensive than that adduced by his counsel.

Insofar as the record discloses petitioner's personal participation in the cross-examination of witnesses, it bears out the wisdom of the trial court's ruling that petitioner should be represented by the counsel he had chosen.

2. The facts summarized in the Statement show that there was ample evidence to support the verdict. The jurors were justified in concluding that petitioner had knowingly passed off cheaper DuPont technical chloroform for the more expensive U. S. P. chloroform called for in the contract. See *Nye & Nissen* v. *United States*, 336 U. S. 613; *Ehrlich* v. *United States*, 238 F. 2d 481 (C. A. 5); and *McClanahan* v. *United States*, 230 F. 2d 919 (C. A. 5), certiorari denied, 352 U. S. 824.

Petitioners' principal contention on this issue is that the government failed to establish that the chloroform was defective at the time of delivery (Pet. 20–22). In particular, they rely on the fact that the samples from Lot No. 2081 and 2105 were accepted as conforming to U. S. P. standards. It is true that these samples were selected by a government inspector and sealed by him and that there is no direct evidence that petitioners tampered with the samples. However, it was shown that after Lot No. 2049 was rejected petitioners purchased a relatively small amount of U. S. P. chloroform; that when the inspector selected the samples from Lot No. 2081 the over 1,000 cases of bottles comprising the lot were stacked five to eight high and in rows (R. 101, 292); and that, after sealing the samples, the government

inspector left them with petitioner to be mailed (R. 106).

The fact is that the chloroform actually shipped did not meet U. S. P. standards. Indeed, petitioners never had in their possession sufficient U. S. P. chloroform to fulfill the contract; they had only technical chloroform. This, coupled with evidence that Lot No. 2081 was really rejected Lot No. 2049 and that Carey induced two of his employees to lie to the F. B. I. agents regarding the "reworking" of the chloroform, justified the jury's conclusion that petitioners wilfully and frauduently supplied technical chloroform instead of U. S. P. chloroform to the government.

Petitioners contend that perhaps the chloroform which was shipped became contaminated after delivery because of the manner in which it was stored or because of the interaction between the bottle contents and the cap used to seal each bottle. The facts in the record negate this defense. First, the contract required petitioners to use an inner seal which was impervious to the contents of the bottle (R. 317). Second, petitioners presented no evidence to show that the cap was of such a nature as to cause the decomposition of chloroform. Third, one bottle of the sample submitted for Lot No. 2081, which met the standard for U. S. P. chloroform, had not decomposed when tested 1 year and seven months after Lot No. 2081 had been shipped by petitioners. Fourth, and most important, petitioners' theory does not account for the fact that the specific gravity of

the chloroform shipped was consistently higher than the specific gravity of U. S. P. chloroform.*

3. Petitioners contend that the prosecuting attorney improperly asserted, during the closing argument, that he personally knew that the five bottles submitted as a sample of Lot. No. 2081 were filled with U. S. P. chloroform obtained by petitioners from McKesson & Robbins Company. However, the very paragraph of argument relied upon by petitioners shows that they misconstrue the prosecutor's remarks (Pet. 24–25).

The prosecutor said in summation,

> Now, I don't know how Mr. Carey got to the Agency the five new samples which bore Lot No. 2081, but I do know where it came from. I know that it was U. S. P. chloroform and I know that it came from McKesson & Robbins.

In the very next breath the prosecutor gave the source of his knowledge, saying,

> If you will look at the exhibits in this case you will find that on March 19, 1952, exactly five days before the second group of samples were sent in to the laboratory, Mr. Carey obtained 3,000 pounds of U. S. P. chloroform from McKesson & Robbins. That is the source of the

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* Petitioners point to the fact that the Armed Forces Board of Contract Appeals denied the government's request for a recovery of some of the money paid under this contract in a civil administrative proceeding. Of course, such a determination, based on whatever evidence was before the Board, is not determinative of the sufficiency of the evidence presented at this trial.

chloroform which he submitted as the second group of samples. [Summations 34][9]

Since the prosecutor did not suggest that he had personal knowledge outside the record as to the source of the sample, the argument was proper. *Lawn* v. *United States,* No. 9, O. T. 1957, decided Jan. 13, 1958, slip opinion p. 19–20, fn. 15; *Henderson* v. *United States,* 218 F. 2d 14, 19 (C. A. 6), certiorari denied, 349 U. S. 920; *United States* v. *Klein,* 187 F. 2d 873, 876–877 (C. A. 7), certiorari denied, 341 U. S. 952. No objection was made to the remarks and, even if it be conceded *arguendo* that the use of the first person in the single passage quoted above was unfortunate, it would hardly justify a new trial. See *United States* v. *Socony-Vacuum Company,* 310 U. S. 150, 240–242.

4. Petitioners contend that the trial judge summarized the evidence in his charge so as to unduly emphasize the prosecution's case, failed to explain or define "knowingly", "wilfully" and other essential elements of the offense, and did not tell the jury that a defendant is presumed to be innocent until proven guilty (Pet. 27–30).

Petitioners made no objection to the instructions given (R. 332). That fact alone, in relation to the evidence in this case, forecloses the present argument. Rule 30, F. R. Crim. P.; *Palmer* v. *United States,* 229 F. 2d 861 (C. A. 10), certiorari denied, 350 U. S. 996; *Wyche* v. *United States,* 193 F. 2d 703, 705 (C. A.

[9] The summations of counsel are not printed in the record as filed by petitioners but appear in a separate transcript, filed herewith, which has been certified to be a part of the original record before the Court of Appeals.

D. C.), certiorari denied, 342 U. S. 943; *Felton* v. *United States*. 170 F. 2d 153, 154 (C. A. D. C.), certiorari denied, 335 U. S. 831; *Cave* v. *United States*, 159 F. 2d 464, 469 (C. A. 8), certiorari denied, 331 U. S. 847. As noted by the Court of Appeals below, none of the claimed errors was so serious as to affect substantial rights (R. 358).

As to the elements of the offense, the court's instructions were adequate. The judge read the statute allegedly violated by the petitioners (R. 323) and then reviewed the allegations in representative counts (R. 325–328). If it is enough to tell the jury the substance of each count when defendant is charged with filing a false and fraudulent income tax return (*Holland* v. *United States*, 209 F. 2d 516, 522 (C. A. 10), affirmed, 348 U. S. 121), then surely it is enough to read both the indictment and the statute when petitioners are charged with submitting a bill containing a false and fraudulent entry.

After explaining the offense, the court undertook merely to explain "generally speaking" what the evidence in the case disclosed (R. 329). The only evidence he discussed in any detail was that of Mr. Hendrixson of the DuPont Company as to the difference between U. S. P. and technical chloroform, noting that DuPont had been the source of supply (R. 329–331). Early in his charge the judge had told the jury that they were the sole judges of the facts and that "neither what counsel may have said in their summations in respect to their understanding of the facts, nor indeed what I may say in my charge

concerning what the evidence is, need conclude you" (R. 324).

Although no instruction on the presumption of innocence was given, it was not requested, and a full instruction on reasonable doubt was given (R. 324). Under these circumstances the absence of an instruction on this presumption is not reversible error. *United States* v. *McGuire*, 64 F. 2d 485, 493 (C. A. 2), certiorari denied, 290 U. S. 645.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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